No. ____

In The
Supreme Court of the United States

BAXTER HEALTHCARE CORPORATION,
Petitioner,

v.

TODD A. WHITE,
Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

To what extent may an employment discrimination plaintiff survive a motion for judgment as a matter of law based on nothing (or little) more than a comparison of his or her qualifications to that of the person selected for the position?

Whether an employment discrimination plaintiff proceeding under the mixed-motive theory may overcome summary judgment without establishing a *prima facie* case of discrimination, and by merely producing "some" evidence of discriminatory intent?

RULE 29.6 CORPORATE DISCLOSURE STATEMENT

Pursuant to Supreme Court Rule 29.6, petitioner Baxter Healthcare Corporation states that it is a wholly-owned subsidiary of its parent corporation, Baxter International Inc. Petitioner further states that Baxter International Inc. has no parent corporation and that there is no publicly held corporation that owns 10% or more of its stock.

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The opinion of the United States District Court for the Eastern District of Michigan, Southern Division, dated April 16, 2007, is unofficially reported at 2007 WL 1119881, and is reproduced at App. B, 62a-65a. The Report and Recommendation of the United States Magistrate Judge, dated February 8, 2007, is also unofficially reported at 2007 WL 1119881, and is reproduced at App. C, 66a-116a.

JURISDICTION

The Court of Appeals' judgment was entered on July 3, 2008. A timely petition for rehearing was denied on October 29, 2008 (App. D, 117a-118a). The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e *et seq.*, as amended, 42 U.S.C. § 1981, and Michigan's Elliot-Larsen Civil Rights Act, Mich. Comp. Laws § 37.2101 *et seq.*

STATEMENT OF THE CASE

This case raises important, recurring legal issues under Title VII of the Civil Rights Act of 1964 and its amendments, including an issue expressly reserved by this Court in *Ash v. Tyson, Inc.*, 546 U.S. 454 (2006), and an issue left undecided by this Court in *Desert Palace v. Costa*, 539 U.S. 90 (2003). In *Ash*, this Court stated "this is not the occasion to define more precisely what standard should govern pretext claims based on superior qualifications." *Ash*, 546 U.S. at 458. In *Desert Palace*, this Court discussed the evidence needed to obtain a mixed-motive jury instruction but did not discuss the appropriate summary judgment framework for analyzing mixed-motive claims. The Courts of Appeals have reached inconsistent and conflicting resolutions to the issues left undecided by this Court in *Ash* and *Desert Palace*. This case presents the opportunity to resolve those conflicts and to provide much needed guidance to all lower courts that regularly encounter these legal issues.

Specifically, this case presents the opportunity to define the appropriate standards that should govern pretext claims based on comparative qualifications and mixed-motive claims based on circumstantial evidence. The claims giving rise to this opportunity are Todd White's claims that Baxter discriminated against him by: 1) promoting Maggie Freed (a white female) to regional manager over White (a black male) and three other white males; and 2) rating White's 2004 overall performance as "Meets Minus."

White's Alleged Failure to Promote Claim

In September 2004, Baxter accepted applications for the position of Anesthesia, Critical Care, and Oncology ("ACCO") Midwest Regional Manager. Regional vice presidents Carl Gold and Carl Kunz and human resources manager Daryl Martin interviewed and considered five candidates: Freed (a white female), White (a black male), Stacy Hord (a white male), Brett Corrick (a white male), and Carey Redd (a white male). Gold, Kunz, and Martin reviewed the candidates' resumes and then interviewed all five candidates separately, each for about one hour. App. 71a-72a.

Following the interviews, Gold, Kunz, and Martin separately ranked the candidates one through five before proceeding to discussing them as a group. All three interviewers ranked Freed as the top candidate. All three interviewers ranked White as fifth out of the five candidates. App. 6a-7a, 72a. Based on the consensus of all three interviewers, Gold decided to select Freed. Notably, White produced no evidence of discriminatory animus toward blacks by Gold, Kunz, or Martin, and admitted in his deposition that he has no reason to think that any of the them harbor a discriminatory animus. App. 72a.

Freed was viewed by all three interviewers as the superior candidate because, as Sales Training Manager, Freed: had managed direct reports -- and had dotted-line managerial experience with respect to a group of field sales trainers; had performed a large amount of training; was well-prepared for the interview with specific objectives for turning around the region; and was enthusiastic and demonstrated

confidence and a high-energy level during her interview. Indeed, as a Sales Training Manager, Freed hired, managed, and trained fourteen to sixteen national field trainers, managed two direct reports, and developed and implemented training programs. Freed won sales trips three times during her employment with Baxter. She was rated as "Exceeds" expectations for 2000, 2001 and 2002, and was regarded as too new to review in her new position for 2003. The interviewers had no concern over Freed's level of product knowledge or experience in selling proprietary pharmaceuticals because she had a sales background and lots of sales experience (she sold proprietary pharmaceuticals while employed by Lederle Laboratories, devices for IMed, and devices for Baxter for several years), she had attended all training classes on the products, she designed training programs and taught the new sales representatives about the products, and had facilitated classes on the products. App. 19a, 73a-74a.

In comparison, White had been a Teaching Center Specialist ("TCS") for three years, a role in which he sold products to anesthesia professionals at larger hospitals that ran teaching programs. A TCS is responsible for sales as any other sales representative, but is held to a higher standard of product knowledge and teaching skills. App. 3a. White had been recognized for his sales performance. While he was rated as "Meets" expectations for 2001 and 2002, he was rated as "Exceeds" expectations for his performance in 2000 and 2003, and received sales awards in those two years. App. 5a. White's interview performance was viewed negatively by all three interviewers. They viewed him as lacking specifics in his business plan for the region, overly tense and/or

aggressive, and failing to demonstrate a strength in coaching others. All three of the evaluators provided specific examples supporting their opinions of White's interview performance. App. 7a-8a.

White's 2004 Performance Evaluation Claim

In 2004, White began reporting to Tim Phillips ("Phillips"), a TCS regional manager. Phillips reported directly to Gold. In early 2004, White alleges that Phillips: occasionally answered White's telephone calls by saying "White, Todd;" once referred to an African-American sales representative as "that black girl," once said "nobody wants to be around a black man;" once said "no one wants to work with a black man;" and once circulated an e-mail that showed an image of Osama Bin Laden morphing into O.J. Simpson with the subject line "I KNEW IT!!! I KNEW IT!!! I KNEW IT!!!". App. 4a.

During 2004, White sold four Baxter products: Suprane, Brevibloc, the Transdermal Delivery System ("TDS"), and the Patient State Analyzer ("PSA"). App. 11a. Of the eight TCS whom Phillips supervised in 2004, White was ranked eighth out of eight on Suprane, tied for eighth out of eight on PSA, sixth out of eight on TDS, and third out of eight on Brevibloc based on year-end sales numbers. White failed to meet his sales goal for PSA and Suprane, ACCO's flagship product. App. 10a-11a.

According to an email sent by Gold to Phillips and all other Regional Managers in October 2004, any representative that did not achieve at least 95% to plan on their year-end Suprane sales would receive a "Does Not Meet" performance rating. App. 10a-11a. At

year-end, White's Suprane sales numbers were only 92% to plan. App. 11a. In January 2005, Phillips rated White's 2004 job performance as "Meets Minus." Phillips provided the following explanation on White's review:

> Based on Todd's quantitative results, Todd has achieved a rating of "Does Not Meet". However, due to Todd's diligence and commitment to the business that has been demonstrated by his focus on Suprane and his consistent work in the Region, I have moved this rating to a Meets(-). This has been a tough and challenging year for Todd White. Todd has had to fight for everything he achieved this year. It is my expectation that Todd will turn his business around in 2005. In 2005, I will expect that all special Marketing programs will be utilized in the designated time frame. In addition, at Mid-year 2005, I will expect that Todd is achieving budget in 2 of 4 categories, one of them being Suprane. Otherwise further corrective action may be needed. Todd has overachieved in the past so I know he is capable with a dedication of more focus on his Baxter ACC franchise.

App. 11a-12a.

All eleven sales representatives, White and ten non-black employees, whose Suprane sales numbers were less than 95 percent to plan in 2004, received a year-end performance rating of "Meets Minus." App. 47a-48a. There is no evidence that any sales representative who failed to meet the Suprane sales goal, regardless of other sales numbers, was rated higher than "Meets Minus."

Employees, like White, who received a "Meets Minus" performance rating received a two percent pay increase in 2005, whereas employees who received a "Meets" performance rating received a three percent pay increase. App. 9a.

White's Lawsuit and Procedural History

In 2005, White filed a lawsuit claiming that Baxter's failure to promote him to the Regional Manager position and its "Meets Minus" evaluation of White's 2004 performance constituted discrimination on the basis of race in violation of Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e *et seq.*, as amended, 42 U.S.C. § 1981, and Michigan's Elliot-Larsen Civil Rights Act, Mich. Comp. Laws § 37.2101 *et seq.* White also claimed that Baxter discriminated against him on the basis of his race and/or sex in other ways that are no longer at issue in this case. App. 12a.

The district court referred Baxter's motion for summary judgment to a magistrate judge, who recommended that Baxter's motion be granted in its entirety. White filed objections to the magistrate judge's report and recommendation. On April 16, 2007, the district court considered those objections, and then adopted the magistrate judge's report and recommendation in full, granted Baxter's motion for summary judgment, and dismissed the case. White appealed to the Sixth Circuit Court of Appeals. App. 13a.

The Sixth Circuit reversed the district court's grant of summary judgment on the two issues remaining in the case on July 3, 2008. On the failure to promote claim, the majority (Clay, J., joined by Keith, J.) held

that "evidence of White's arguably superior qualifications for the ACCO regional manager position, in and of itself, could lead a jury to doubt the justification given for Baxter's hiring decision. At minimum, White has created a genuine issue of material fact concerning the reasonableness of Baxter's decision." App. 23a. This portion of the opinion drew a dissent (Gilman, J.). App. 50a-61a.

On the performance evaluation claim, the Sixth Circuit created and applied a new summary judgment framework for mixed-motive claims. In doing so, the Sixth Circuit eliminated the need for a plaintiff to establish a *prima facie* case under the *McDonnell Douglas* framework. App. 35a-40a. The Sixth Circuit then held that Phillips' alleged discriminatory comments in early 2004 and his alleged failure to apply the correct performance review standard in January 2005 were sufficient evidence to create a material issue of fact as to whether White's race was a motivating factor for his "Meets Minus" performance evaluation. App. 40a-49a.

Baxter filed a petition for rehearing *en banc* on July 17, 2008. That petition was denied on October 29, 2008. App. 117a-118a.

REASONS FOR GRANTING THE PETITION

I. THE SIXTH CIRCUIT'S "ARGUABLY SUPERIOR QUALIFICATIONS" STANDARD FOR PRETEXT CLAIMS CONFLICTS WITH THE STANDARDS ADOPTED BY OTHER COURTS OF APPEALS ON AN IMPORTANT FEDERAL QUESTION NOT YET DECIDED BY THIS COURT

In reversing the district court's grant of summary judgment in Baxter's favor on White's failure to promote claim, the Sixth Circuit held that "White's *arguably superior* qualifications for the ACCO regional manager position, in and of itself, could lead a jury to doubt the justifications given for Baxter's hiring decision" and thus constitutes sufficient evidence of pretext under the burden-shifting framework first established in *McDonnell Douglas Corp. v. Green*, 411 U.S. 702 (1973) to allow White's claim to go to a jury. App. 23a (emphasis added). The Sixth Circuit's ruling (a) conflicts with the standards used by other Courts of Appeals on (b) the important and unresolved question of how a court is to analyze the extent to which comparative qualifications evidence suffices to show pretext under the federal anti-discrimination laws.

Thousands of employers every day compare the qualifications or performance of their employees, or candidates for employment. They do it when determining whether to hire candidate A or candidate B. They do it when deciding whether to promote employee C or employee D. They do it when, faced with difficult economic circumstances, selecting whether to separate employee E or employee F.

As this Court has recognized, Title VII "was not intended to 'diminish traditional management prerogatives' . . . The fact that a court may think that the employer misjudged the qualifications of the applicants does not in itself expose him to Title VII liability, although this may be probative of whether the employer's reasons are pretexts for discrimination." *Texas Dep't of Comm. Affairs v. Burdine*, 450 U.S. 248, 259 (1981) (quoting *Steelworkers v. Weber*, 443 U.S. 193, 207 (1979)). Indeed, based on that principle, nearly every Court of Appeals has recognized a "business judgment rule" under which courts do not sit as "super-personnel departments" to second-guess employers' evaluations of their employees absent other evidence of discrimination.[1]

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[1] *E.g., Rossy v. Roche Products, Inc.*, 880 F.2d 621, 625 (1st Cir. 1989) (the court's role is not to second-guess the business decisions of an employer, or to impose its subjective judgments of which person would best fulfill the responsibilities of a certain job); *Byrnie v. Town of Cromwell, Bd. of Ed.*, 243 F.3d 93, 103 (2d Cir. 2001) ("the court must respect the employer's unfettered discretion to choose among qualified candidates"); *Ezold v. Wolf, Block, Schorr & Solis-Cohen*, 983 F.2d 509, 527 (3d Cir. 1993) ("courts must be vigilant not to intrude into [the personnel decision], and should not substitute their judgment for that of the [employer]"); *Anderson v. Westinghouse Savannah River Co.*, 406 F.3d 248, 269 (4th Cir. 2005) (plaintiff must compete for the promotions on the qualifications established by her employer, and courts are not focused on the wisdom of the business judgment); *Scott v. Univ. of Miss.*, 148 F.3d 493, 509 (5th Cir. 1998) (disagreements over applicants' qualifications are employment decisions in which the court "will not engage in the practice of second guessing"), *abrogated on other grounds by Kimel v. Fla. Bd. of Regents*, 528 U.S. 62 (2000); *Brennan v. Tractor Supply Co.*, 237 Fed. Appx. 9, 23 (6th Cir. 2007) ("It is well-settled . . . that management retains the right to choose from among qualified

But the Sixth Circuit's standard in *White* means that virtually any time an individual of a protected status is considered for but ultimately not selected for a promotion, not hired for a job, or is selected out of a group of employees for a reduction in force on the basis that the employer preferred the qualifications of a different candidate or employee, that individual can force an employer to endure the cost and risk of a jury trial.

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candidates, particularly in selecting management-level employees, as long as the reasons for its choices are not discriminatory; it is not the role of the court to question a business's choice from among qualified candidates"); *Hasham v. Cal. St. Bd. of Equalization*, 200 F.3d 1035, 1048 (7th Cir. 2000) (the court recognized that it "has consistently avoided stepping into the role of a super-personnel department and second guessing legitimate personnel decisions"); *Gilbert v. Des Moines Area Comm. College*, 495 F.3d 906, 916 (8th Cir. 2007) ("the employment discrimination laws have not vested in the federal courts the authority to sit as super-personnel departments reviewing the wisdom or fairness of the business judgments made by employers"); *Coghlan v. Am. Seafood Co.*, 413 F.3d 1090, 1099 (9th Cir. 2005) (the quality of the employer's "business judgment is only relevant insofar as it suggests that his decisions were explainable only as the product of illegal discrimination"); *Verniero v. Air Force Acad. Sch. Dist. No. 20*, 705 F.2d 388, 390 (10th Cir. 1983) ("[i]t is not the duty of a court nor is it within the expertise of the courts to attempt to decide whether the business judgment of the employer was right or wrong" and "[t]he court is not a super personnel department"); *Combs v. Plantation Patterns*, 106 F.3d 1519, 1543 (11th Cir. 1997) ("federal courts do not sit to second-guess the business judgment of employers"); *Fischbach v. D. C. Dep't of Corr.*, 86 F.3d 1180, 1183 (D.C. Cir. 1996) ("Even if a court suspects that a job applicant was victimized by poor selection procedures, it may not second-guess an employer's personnel decision absent demonstrably discriminatory motive").

While the business judgment rule does not insulate from liability all employer decisions when comparing employees to each other, a standard under which a plaintiff's "arguably superior" qualifications -- "in and of itself" -- generally will cause a discrimination case to go to a jury trial is inconsistent with the standard used by the other Courts of Appeals and unduly jeopardizes management prerogatives.[2]

A. COURTS OF APPEALS OTHER THAN THE SIXTH CIRCUIT HAVE REQUIRED PLAINTIFFS RELYING ON NOTHING OR LITTLE MORE THAN COMPARATIVE QUALIFICATIONS TO SHOW A VAST DISPARITY TO AVOID JUDGMENT AS A MATTER OF LAW IN THE EMPLOYER'S FAVOR

Under the Sixth Circuit's standard in *White*, all a plaintiff need show to produce sufficient evidence of pretext to avoid judgment as a matter of law in the employer's favor is that his or her qualifications are "arguably superior" to the candidate selected. App.

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[2] Indeed, the "business judgment rule" can be found in the pattern jury instructions for several Circuits, including the Third, Seventh, Eighth, and Eleventh. 3d Cir. Civil Jury Instr. 5.1.2 (2008); 7th Cir. Civil Jury Instr. 3.07; 8th Cir. Civil Jury Instr. 5.94 (2007); 11th Cir. Civil Jury Instr. 1.3.1 (2005). The business judgment rule is so ingrained in employment law that one Court of Appeals held that a district court's refusal to instruct the jury on it constituted reversible error. *See Scamardo v. Scott County*, 189 F.3d 707, 711 (8th Cir. 1999) ("in an employment discrimination case, a business judgment instruction is crucial to a fair presentation of the case") (internal quotation mark omitted).

23a.[3] While this Court has considered but not decided

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[3] White likely will characterize the majority's decision as relying on more than White's "arguably superior" qualifications for the Regional Manager position. Specifically, the Sixth Circuit noted that "any evaluation of White's interview performance is an inherently subjective determination, and thus easily susceptible to manipulation in order to mask the interviewer's true reasons for making the promotion decision." App. 24a. But the majority's decision clearly held that "evidence of White's arguably superior qualifications for the ACCO Regional Manager position, *in and of itself*, could lead a jury to doubt the justifications given for Baxter's hiring decision." App. 23a (emphasis added). Further, this is not a case where a comparison of candidates' qualifications is merely a part of other significant probative evidence of pretext or discrimination. *See Bender v. Hecht's Department Stores*, 455 F.3d 612, 626-27 (6th Cir. 2006) ("Whether qualifications evidence will be sufficient to raise a question of fact as to pretext will depend on whether a plaintiff presents other evidence of discrimination. . . . [I]n the case in which there is little or no other probative evidence of discrimination, to survive summary judgment the rejected applicant's qualifications must be so significantly better than the successful applicant's qualifications that no reasonable employer would have chosen the latter applicant over the former."). Here, the Sixth Circuit relied, at most, on "little" other probative evidence of discrimination – the fact that Baxter's evaluation of the candidates' interview performance is an "inherently subjective determination, and thus easily susceptible to manipulation in order to mask the interviewer's true reasons for making the promotion decision." App. 24a. By doing so, the Sixth Circuit placed itself at odds with the established authority of other circuits that recognize that Title VII does not deprive an employer of its ability to rely upon subjective criteria in making employment decisions. *See, e.g., Millbrook v. IBP*, 280 F.3d 1169 (7th Cir. 2002) ("the fact that an employer based a hiring or promotion decision on purely subjective criteria will rarely, if ever, prove pretext under Title VII"); *Manning v. Chevron Chem. Co. LLC*, 332 F.3d 874, 882 (5th Cir. 2003); *Denney v. City of Albany*, 247 F.3d 1172, 1186 (11th Cir. 2001).

"what standard should govern pretext claims based on superior qualifications," *Ash v. Tyson Foods, Inc.*, 546 U.S. 454, 458 (2006), the Sixth Circuit's "arguably superior" standard conflicts with standards enunciated by several Courts of Appeals.

The Second, Fifth, Sixth, Seventh, and Eleventh Circuit Courts of Appeals have held that a plaintiff must show that no reasonable employer could have chosen the candidate selected over the plaintiff in order to demonstrate sufficient evidence of pretext to survive summary judgment. *Byrnie v. Town of Cromwell, Bd. of Ed.*, 243 F.3d 93, 103 (2d Cir. 2001) ("plaintiff's credentials would have to be so superior to the credentials of the person selected for the job that no reasonable person . . . could have chosen the candidate selected over the plaintiff") (internal quotation marks omitted); *Gillaspy v. Dallas Independent School Dist.*, 278 Fed. Appx. 307, 313-314 (5th Cir. 2008) ("disparities in qualifications [must be] of such weight and significance that no reasonable person, in the exercise of impartial judgment, could have chosen the candidate selected over the plaintiff for the job in question") (quoting *Deines v. Tex. Dep't of Protective & Regulatory Servs.*, 164 F.3d 277, 280-81 (5th Cir. 1999); *Bender v. Hecht's Department Stores*, 455 F.3d 612, 626-27 (6th Cir. 2006) ("in the case in which there is little or no other probative evidence of discrimination, to survive summary judgment the rejected applicant's qualifications must be so significantly better than the successful applicant's qualifications that no reasonable employer would have chosen the latter applicant over the former."); *Mlynczak v. Bodman*, 442 F.3d 1050, 1059-60 (7th Cir. 2006) ("evidence of the applicants' competing qualifications does not constitute evidence of pretext

unless those differences are so favorable to the plaintiff that there can be no dispute among reasonable persons of impartial judgment that the plaintiff was clearly better qualified for the position at issue.") (quoting *Millbrook v. IBP, Inc.*, 280 F.3d 1169, 1180 (7th Cir. 2002)); *Springer v. Convergys Customer Mgt. Group Inc.*, 509 F.3d 1344, 1349 (11th Cir. 2007) ("plaintiff must show that the disparities between the successful applicant's and his own qualifications were 'of such weight and significance that no reasonable person . . . could have chosen the candidate selected over the plaintiff [for the job in question]") (quoting *Cooper v. Southern Co.*, 390 F.3d 695, 732 (11th Cir. 2004)).

The D.C., Fourth, Ninth, and Tenth Circuit Courts of Appeals have held a plaintiff must show that his or her qualifications are demonstrably, clearly, or significantly better than the candidate selected in order to produce sufficient pretext evidence to avoid summary judgment. *Jackson v. Gonzales*, 496 F.3d 703, 707 (D.C. Cir. 2007) ("if a fact finder can conclude that a reasonable employer would have found the plaintiff to be significantly better qualified for the job, but this employer did not, the fact finder can legitimately infer that the employer consciously selected a less-qualified candidate – something that employers do not usually do, unless some other strong consideration, such as discrimination, enters into the picture. . . [I]n order to justify an inference of discrimination, the qualifications gap must be great enough to be inherently indicative of discrimination") (internal quotations and citations omitted);*Heiko v. Columbo Savings Bank, F.S.B.*, 434 F.3d 249, 261-62 (4th Cir. 2006) (if "the plaintiff has made a strong showing that his qualifications are demonstrably

superior, he has provided sufficient evidence that the employer's explanation may be pretext for discrimination," but where "a plaintiff asserts job qualifications that *are similar or* only slightly superior to those of the person eventually selected, the promotion decision remains vested in the sound business judgment of the employer."); *Raad v. Fairbanks North Star Borough Sch. Dist.*, 323 F.3d 1185, 1194 (9th Cir. 2003) (a finding that plaintiff's qualifications are "clearly superior" to the qualifications of the applicant selected is a proper basis for a finding of discrimination); *Simms v. Okla. ex rel. Dep't of Mental Health & Substance Abuse Servs.*, 165 F.3d 1321, 1330 (10th Cir. 1999) (denying an inference of discrimination if "neither [candidate] is clearly better qualified").

The First and Eighth Circuit Court of Appeals have not articulated how much better qualified a plaintiff must be than the candidate selected, but have indicated that the plaintiff must be somehow materially, as opposed to merely "arguably," superior in order to survive summary judgment in the absence of other evidence of pretext or discrimination. *Rathburn v. Autozone, Inc.*, 361 F.3d 62, 74-75 (1st Cir. 2004) ("In a rare case, the disappointed applicant may be able to prove pretext by showing that she was in fact better qualified than the individual selected. But that is an uphill struggle: in the absence of strong objective evidence (e.g., test scores), proof of competing qualifications will seldom, in and of itself, be sufficient to create a triable issue of pretext. . . . We recognize that there may be situations in which the difference in qualifications is so stark as to support an inference of pretext") (internal citations omitted); *Chock v. Northwest Airlines*, 113 F.3d 861, 864 (8th Cir. 1997)

("a comparison that reveals that the plaintiff was only similarly qualified or not as qualified as the selected candidate would not raise an inference of racial discrimination").[4]

B. THE SIXTH CIRCUIT'S "ARGUABLY SUPERIOR QUALIFICATIONS" STANDARD IMPERMISSIBLY IMPINGES ON EMPLOYERS' BUSINESS JUDGMENT AND THREATENS A DELUGE OF EMPLOYMENT DISCRIMINATION JURY TRIALS

The Sixth Circuit's low regard for employers' business judgment and low threshold for a comparative qualification argument renders Fed. R. Civ. P. 56 impotent in a large number of discrimination cases and thus forces employers to defend jury trials in a large percentage of its employment decisions.

Indeed, under the "arguably superior" standard, Baxter probably would have faced a jury trial had it selected White instead of Freed for the Regional Manager position. Freed was the only female considered for the position, and thus could have satisfied all elements of the *prima facie* case if Baxter had selected White, a male. Further, under the majority's standard, Freed could show sufficient evidence of pretext by relying upon the "inherently subjective determination" in the interview process, combined with *her* arguably superior qualifications.

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[4] The Third Circuit has not squarely articulated a standard on this topic.

Thus, the majority's standard places Baxter -- and any other employer -- on a "high tightrope without a net beneath [it]." *United Steelworkers of America, AFL-CIO-CLC v. Weber,* 443 U.S. 193, 209-10 (1979) (Blackmun, J., concurring) (in describing the effect of prohibiting affirmative action, stating that "If Title VII is read literally, on the one hand [employers] face liability for past discrimination against blacks, and on the other they face liability to whites for any voluntary preferences adopted to mitigate the effects of prior discrimination against blacks."). Under the majority's reasoning, if Baxter selects Freed, it faces a sex discrimination jury trial. If Baxter selects White, it faces a race discrimination jury trial. If Baxter selects one of the three white male employees under consideration, it faces jury trials involving both claims. Under the majority's reasoning, an employer's only relief from the expense and uncertainty of a jury trial in any personnel decision where the comparison of employees does not reveal a clear and obvious choice is: (a) avoid any subjective decisions" inevitably a part of the hiring and promotion decisions that employers must make in the course of business," slip op. at 22)" (which as Judge Gilman recognized in dissent, are "inevitably a part of the hiring and promotion decisions that employers must make in the course of business," App. 54a); or (b) pay the individuals not selected a sum of money for a release.

This phenomenon certainly is not limited to the facts presented in this case. Any time an employer interviews or strongly considers more than one applicant to hire or to promote to a position, or considers more than one employee in deciding whom to select for a reduction in force, it is highly likely that two or more candidates possess advantages (and

disadvantages) to their candidacy. Otherwise, the employer would not have wasted its resources in considering or interviewing more than the one candidate ultimately selected for the position. Thus, the candidate who did not obtain the position likely will have "arguably superior" qualifications. Those qualifications may not be clearly, significantly, or even merely better than the candidate who obtained the position, but, unless the comparison does not make for a "close call" (in which case the rejected candidate likely would not have been seriously considered), those qualifications will be "*arguably* superior."

Under the Sixth Circuit's standard in *White*, the considered but rejected candidate, based solely on those "arguably superior" qualifications, is able to force an employer to endure the risk and expense of a jury trial so long as he or she can meet the "not onerous" burden of the *prima facie* case. *Texas Dep't of Comm. Affairs v. Burdine*, 450 U.S. 248, 253 (1981).

This standard is irreconcilable with established precedent concerning a plaintiff's ultimate burden of proof in discrimination cases. *Millbrook v. IBP, Inc.*, 280 F.3d 1169, 1181-82 (7th Cir. 2002). "[T]o avoid a directed verdict or a JNOV, a plaintiff must do more than merely argue that the jury might have chosen to disbelieve all of the defendant's evidence. . . . A plaintiff must offer substantial evidence to support the argument." *Id.* at 1181; *Reeves v. Sanderson Plumbing Prods., Inc.*, 530 U.S. 133, 148 (2000) (holding that to survive a Rule 50 challenge, a plaintiff must, at the very least, establish a *prima facie* case of discrimination and present *sufficient evidence* that the employer's asserted justification is false). Thus, a jury verdict resting solely on disbelieving a defendant's

proffered justification for its employment decision cannot survive a motion for judgment notwithstanding the verdict; rather, the plaintiff must put forward some quantum of evidence sufficient to support that disbelief. *Id.* To allow a plaintiff's "arguably superior" qualifications, without more, to serve as that quantum of evidence is inconsistent with the acknowledgment of nearly every court of appeals, as set forth *supra*, that it is not the court's role to act as a "super personnel department" that second-guesses employers' business judgments:

> [N]either the judge nor the jury is "as well suited by training and experience to evaluate qualifications for high level promotion in other disciplines as are those persons who have trained and worked for years in that field of endeavor for which the applications under consideration are being evaluated."

Millbrook, 280 F.3d at 1181 (quoting *Odom v. Frank*, 3 F.3d 839, 847 (5th Cir. 1993)). Here, the decision to promote Freed over White for the Regional Sales Manager position was made by two vice presidents in the Sales Division and a human resources professional. To allow a jury to substitute its opinion for that of these experienced professionals, based on nothing more than White's "arguably superior" qualifications, would subject such a verdict to judgment notwithstanding the verdict under established principles. Yet that is precisely what the Sixth Circuit has invited in *White*.

The importance of a consistent standard to govern comparative qualifications claims is even more clear given the (inter)national economy in which employers

operate. Due to the increasing role of technology, and particularly mobile technology, employers often do not limit their consideration of candidates for a position to a particular worksite. When they consider filling a position, it often does not matter where the candidate lives: a manager, director, or vice president sitting in one state often supervises employees working out of several states via electronic mail, cell phones, video conferences, or voice-over internet. A supervisor in Baltimore may supervise employees not just in Baltimore, but also in Boston, Berkeley, Boulder, Bay City, or even Bangalore or Beijing. If business circumstances force that supervisor to select one of her employees for a reduction in force, an inconsistent comparative qualifications standards forces her to consider whether selecting the employee in Bay City, Michigan (within the Sixth Circuit) for the reduction in force carries significant additional risk. Indeed, here, Freed resides and works out of Indiana (and governed by Seventh Circuit precedent), and White out of Michigan (and governed by what stands now as significantly different Sixth Circuit precedent).

While *Ash* may not have presented the occasion for this Court "to define more precisely what standard should govern pretext claims based on superior qualifications," this case does.

II. THE SIXTH CIRCUIT'S SUMMARY JUDGMENT FRAMEWORK FOR TITLE VII MIXED-MOTIVE CLAIMS CONFLICTS WITH DECISIONS FROM SEVERAL COURTS OF APPEALS AND THE SUPREME COURT OF THE UNITED STATES

The Sixth Circuit reversed the district court's grant of summary judgment in Baxter's favor on White's claim concerning his "Meets Minus" performance rating, based largely on the reason that Phillips' alleged race-biased comments constituted "some evidence" that race was *a* motivating factor for the "meets minus" rating. That White could not show any similarly-situated non-black employees were treated differently did not matter under the Sixth Circuit's ruling, as it held that a plaintiff proceeding under a mixed-motive theory need not make out a *prima facie* case of discrimination at the summary judgment stage.

White's performance rating claim raises an important legal issue that has divided the lower courts since this Court's decision in *Desert Palace, Inc. v. Costa*, 539 U.S. 90 (2003). In *Desert Palace*, this Court held that direct evidence was not required in order to obtain a mixed-motive jury instruction under Title VII of the Civil Rights Act of 1964, as amended by the Civil Rights Act of 1991. *See id.* at 92, 101-102. Specifically, this Court held that in order to obtain a mixed-motive jury instruction, the plaintiff "need only present sufficient evidence . . . that race . . . was a motivating factor for any employment practice." *See id.* at 101. In *Desert Palace*, this Court did not address the appropriate summary judgment framework to be applied in Title VII mixed-motive claims supported only by circumstantial evidence.

The Sixth Circuit acknowledged that: "Since *Desert Palace,* the federal courts of appeals have . . . developed widely differing approaches to the question of how to analyze summary judgment challenges in Title VII mixed-motive cases." App. 32a. After recognizing a Circuit split in authority and expressly rejecting the view of several Circuits, the Sixth Circuit created a new summary judgment framework for analyzing Title VII mixed-motive claims. App. 32a-37a. In doing so, the Sixth Circuit eliminated a plaintiff's need to establish a *prima facie* case under the *McDonnell Douglas* summary judgment framework. The Sixth Circuit's elimination of the *prima facie* case is in direct conflict with decisions of the Fifth, Eighth, and Eleventh Circuits. App. 35a. The Sixth Circuit then applied its newly-created summary judgment framework in a manner that conflicts with decisions of this Court. App. 36a-40a.

A. THE SIXTH CIRCUIT'S SUMMARY JUDGMENT FRAMEWORK FOR TITLE VII MIXED-MOTIVE CLAIMS CONFLICTS WITH DECISIONS OF THE FIFTH, EIGHTH, AND ELEVENTH CIRCUITS

The Sixth Circuit's mixed-motive summary judgment framework requires a plaintiff to "produce evidence sufficient to convince a jury that: (1) the defendant took an adverse employment action against the plaintiff; and (2) 'race, color, religion, sex, or national origin was *a* motivating factor' for the defendant's adverse employment action" (App. 36a (emphasis in original)); 42 U.S.C. § 2000e-2(m). In creating this new summary judgment framework, the panel held that "the *McDonnell Douglas/Burdine* burden-shifting framework does *not* apply to the

summary judgment analysis of Title VII mixed-motive claims." App. 35a (emphasis in original). The Sixth Circuit's rejection of the *McDonnell Douglas* summary judgment framework conflicts directly with decisions of the Fifth, Eighth, and Eleventh Circuits, all of which require a plaintiff to make out a *prima facie* case under *McDonnell Douglas* in order to proceed to trial under a mixed-motive theory.

In the Fifth Circuit, a "modified *McDonnell Douglas*" summary judgment framework applies to Title VII mixed-motive cases. *See Keelan v. Majesco Software, Inc.*, 407 F.3d 332, 341 (5th Cir. 2005) *citing Rachid v. Jack in the Box, Inc.*, 376 F.3d 305, 312 (5th Cir. 2004). Significantly, the Fifth Circuit's "modified *McDonnell Douglas*" framework requires the plaintiff to establish a *prima facie* case under *McDonnell Douglas*. Specifically, the Fifth Circuit requires the plaintiff to establish that he: 1) is a member of a protected class; 2) was qualified for the position; 3) suffered an adverse employment action; and 4) others outside the protected class who were similarly situated were treated more favorably. *See id.* at 339; *see also McDonnell Douglas*, 411 U.S. at 802 (1973); *Burdine*, 450 U.S. at 253 (1981). Contrary to the Fifth Circuit, the Sixth Circuit's summary judgment framework for Title VII claims does not require the plaintiff to establish a *prima facie* case under *McDonnell Douglas*. The significance of this conflict is highlighted by the statement in Judge Gilman's concurrence: "White's claim would certainly fail under the . . . *McDonnell Douglas* framework . . . if for no other reason than that he has failed to show that any similarly situated employee was treated more favorably than he was." App. 59a.

In the Eighth and Eleventh Circuits, a straight *McDonnell Douglas* summary judgment framework applies to Title VII mixed-motive cases where, as here, the plaintiff lacks "direct evidence." *See Griffith v. City of Des Moines*, 387 F.3d 733, 736 (8th Cir. 2004) (the court stated that *Desert Palace* "had *no* impact on prior Eighth Circuit summary judgment decisions" and required the plaintiff to meet his burden under the *McDonnell Douglas* framework); *Burstein v. Emtel, Inc.*, 137 Fed. Appx. 205, 209 n.8 (11th Cir. 2005) (suggesting that the *McDonnell Douglas* framework continues to apply in Title VII mixed-motive cases after *Desert Palace*). Accordingly, a plaintiff in the Eighth and/or Eleventh Circuits who lacks direct evidence must establish a *prima facie* case to defeat a motion for summary judgment. The Sixth Circuit's explicit rejection of the *McDonnell Douglas* summary judgment framework in Title VII mixed-motive cases is therefore in direct conflict with the Eighth and Eleventh Circuits—where White's performance evaluation claim would certainly fail because he lacks "direct evidence" of discrimination and can not establish a *prima facie* case.

In the Fourth, Ninth, and D.C. Circuits, a plaintiff in a Title VII mixed-motive case can overcome summary judgment by meeting his burdens of proof under *McDonnell Douglas* or by presenting evidence that an impermissible factor such as race "motivated" the defendant's adverse employment action. *See Diamond v. Colonial Life & Accident Insurance*, 416 F.3d 310, 318 (4th Cir. 2005) ("A plaintiff can survive a motion for summary judgment by presenting direct or circumstantial evidence that . . . race motivated the employer's adverse employment decision"); *McGinest v. GTE Service Corp.*, 360 F.3d 1103, 1122 (9th Cir.

2004) ("[A plaintiff] may proceed by using the *McDonnell Douglas* framework, or . . . produc[ing] direct or circumstantial evidence demonstrating that a discriminatory reason more likely than not motivated [the defendant]"); *Fogg v. Gonzales*, 492 F.3d 447, 451 (D.C. Cir. 2007) (A plaintiff "can establish an unlawful employment practice by showing that discrimination . . . played a motivating part or was a substantial factor in the employment decision") (internal quotation marks omitted).

In the First, Second, Third, Seventh, and Tenth Circuits, the Courts of Appeals have either not considered, or have refrained from deciding whether the *McDonnell Douglas* summary judgment framework applies to Title VII mixed-motive claims supported only by circumstantial evidence. *See, e.g, Rodriguez v. Sears Roebuck de Puerto Rico, Inc.*, 432 F.3d 379, 380-81 (1st Cir. 2005); *Houser v. Carpenter Tech. Corp.*, 216 Fed. Appx. 263, 265 (3rd Cir. 2007) (refusing to decide the issue because the plaintiff failed to provide sufficient evidence to defeat summary judgment under any mixed-motive standard); *Furaus v. v. Citadel Comm. Corp.*, 168 Fed. Appx. 257, 260 (10th Cir. 2006) (refusing to decide the issue because the plaintiff failed properly to preserve the argument for appeal).

The Supreme Court's authoritative voice is needed to address the Circuit conflict, inconsistency, and absence of an appropriate summary judgment framework for Title VII mixed-motive cases. The need for this Court's guidance is demonstrated by the direct conflict among several Courts of Appeals (*e.g.*, the conflict between the Sixth Circuit and the Fifth, Eighth, and Eleventh Circuits), the multiple different summary judgment frameworks that have been

adopted (*e.g.*, the different frameworks adopted by the Fourth, Fifth, Sixth, and Eighth Circuits), and the multiple Courts of Appeal who have not yet adopted a summary judgment framework for Title VII mixed-motive claims (*e.g.*, the First, Second, Third, Seventh, and Tenth Circuits). The need for Supreme Court review is further highlighted by the fact that White's performance evaluation claim, if presented with identical facts to other Courts of Appeals, would have been decided differently by at least three different Circuits. The issues raised by White's performance evaluation claim present this Court with the opportunity to provide clear guidance on an exceptionally important and recurring issue in employment law jurisprudence.

B. THE SIXTH CIRCUIT'S APPLICATION OF ITS SUMMARY JUDGMENT FRAMEWORK FOR TITLE VII MIXED-MOTIVE CLAIMS CONFLICTS WITH SUPREME COURT PRECEDENT

The Sixth Circuit applied its new summary judgment framework for Title VII mixed-motive claims in a manner that conflicts in principle with previous decisions of this Court. Specifically, it held that in order to defeat summary judgment in a Title VII mixed-motive case, the plaintiff need only produce "some" evidence in support of a mixed-motive claim. App. 36a. The Sixth Circuit explained that "the burden of producing 'some' evidence . . . is not onerous and should preclude sending the case to the jury *only* where the record is devoid of evidence that could reasonably be construed to support the plaintiff's claim." App. 36a-37a (emphasis added). The burden of producing "some" evidence conflicts with this Court's

decisions in *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 252 (1986) and *Improvement Co. v. Munson*, 14 Wall. 442, 448, 20 L. Ed. 867 (1872).

In *Anderson*, a case that addressed litigants' summary judgment burdens, this Court discussed the "sufficiency" of evidence and held that "the mere existence of a scintilla of evidence in support of the plaintiff's position will be insufficient; there must be evidence on which the jury could reasonably find for the plaintiff. The judge's inquiry . . . unavoidably asks whether reasonable jurors could find by a preponderance of the evidence that the plaintiff is entitled to a verdict." *Id.* at 251-52. In *Munson*, this Court first stated, and has several times repeated:

> Nor are judges any longer required to submit a question to a jury merely because *some* evidence has been introduced by the party having the burden of proof, unless the evidence be of such a character that it would warrant the jury in finding a verdict in favor of that party. Formerly it was held that if there was what is called a *scintilla* of evidence in support of a case the judge was bound to leave it to the jury, but recent decisions of high authority have established a more reasonable rule, that in every case, before the evidence is left to the jury, there is a preliminary question for the judge, not whether there is literally no evidence, but whether there is any upon which a jury could properly proceed to find a verdict for the party producing it, upon whom the *onus* of proof is imposed.

14 Wall. at 448 (emphasis added). Further, in *Desert Palace*, this Court required the plaintiff to provide "sufficient" evidence that an impermissible reason motivated the adverse employment action in order to receive a mixed-motive jury instruction. 539 U.S. at 101. The Sixth Circuit's requirement that a plaintiff need only produce "some" evidence to overcome summary judgment, and that the defendant must demonstrate that the record is "devoid" of evidence in order to obtain summary judgment conflicts with a long line of Supreme Court precedent that requires a plaintiff to produce "sufficient" evidence to overcome summary judgment.

C. THE SIXTH CIRCUIT'S SUMMARY JUDGMENT FRAMEWORK FOR TITLE VII MIXED-MOTIVE CLAIMS, AND APPLICATION OF THAT FRAMEWORK, THREATENS TO RENDER SUMMARY JUDGMENT RARE IN EMPLOYMENT DISCRIMINATION CASES

The Sixth Circuit erred by creating a summary judgment framework for Title VII mixed-motive claims that does not require a plaintiff to establish a *prima facie* case. It further erred by requiring only "some" evidence of race as a motivating factor to overcome judgment, as opposed to requiring "sufficient" evidence that race was a motivating factor. By not requiring plaintiffs to establish a *prima facie* case under *McDonnell Douglas* and then requiring only "some" evidence of race as a motivating factor to overcome summary judgment, the Sixth Circuit's summary judgment framework threatens to make jury trials all but certain in Title VII mixed-motive cases. Indeed, the Sixth Circuit explicitly intends this: "As '[i]nquiries

regarding what actually motivated an employer's decision are very fact intensive,' such issues 'will generally be difficult to determine at the summary judgment stage' and thus will typically require sending the case to the jury." App. 40a.

To exemplify the impact of the Sixth Circuit's summary judgment framework for mixed-motive claims, the Court should look first at the result in this case. White presented no "direct evidence" of race discrimination and could not establish a *prima facie* case under *McDonnell Douglas*. Specifically, it is undisputed that White could not demonstrate that others outside of his protected class were treated more favorably than he was. In fact, all of the representatives outside White's protected class who, like White, failed to meet their year-end Suprane sales goals, were treated exactly the same as White -- they received "Meets Minus" performance ratings. App. 47a-48a. White's performance evaluation claim, for which the actual damages are one percent of his 2005 salary (App. 9a), is proceeding to a jury trial on the basis of Phillips' alleged comments in early 2004 and White's own belief that Phillips applied the wrong standard in evaluating his 2004 job performance, App. 40a-49a, despite the fact that Phillips applied that same standard in evaluating all of his direct reports, and that Baxter rated all ten others who achieved less than 95 percent of their Suprane sales goal as "Meets Minus." App. 47a-48a.

White's inability to establish a *prima facie* case under *McDonnell Douglas*, and his faint circumstantial evidence of race discrimination should preclude him from overcoming a motion for summary judgment—and it certainly would in at least three

other Courts of Appeals (*e.g.*, the Fifth, Eighth, and Eleventh Circuits). The impact of the Sixth Circuit's summary judgment framework for mixed-motive claims is much broader than just this case. For example, applying its summary judgment framework to a reduction-in-force would proceed as follows:

A plaintiff whose employment was terminated in a reduction-in-force, along with 100 other employees, all of whom were outside of the plaintiff's protected class, would be entitled to a jury trial solely if he claimed that his supervisor made a single alleged discriminatory comment. That the plaintiff could not identify anyone outside of the protected class who was treated more favorably would not matter, because the plaintiff need not meet that element of the *prima facie* case. That the plaintiff was not replaced by anyone would not matter, again because the plaintiff need not meet that element of the *prima facie* case. That 100 others outside the protected class were treated exactly the same way as the plaintiff would not matter, because the plaintiff has produced "some" evidence in support of his claim. And that the employer's business reasons for its decisions are entirely reasonable would not matter for purposes of summary judgment, again because the plaintiff has produced "some" evidence in support of his claim.

By any measure, employment discrimination claims make up a large part of the federal docket. Yet, the Sixth Circuit's summary judgment framework and its application of that framework will make jury trials far more frequent -- thereby eliminating the beneficial screening function of the summary judgment process and undoubtedly increasing the number of Title VII litigants who pursue mixed-motive claims. *See*

Crawford-El v. Britton, 523 U.S. 574, 600 (1998) ("[S]ummary judgment serves as the ultimate screen to weed out truly insubstantial lawsuits prior to trial"). The end result of the Sixth Circuit's decision will likely be overcrowded dockets and delays in case resolution throughout the Sixth Court and other courts that adopt its new summary judgment framework for Title VII mixed-motive cases. This Court should grant this petition for a writ of certiorari and instruct the Courts of Appeals and District Courts of the proper summary judgment framework for mixed-motive claims under *Desert Palace*.

Respectfully submitted,

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APPENDIX

APPENDIX A

RECOMMENDED FOR FULL-TEXT PUBLICATION
Pursuant to Sixth Circuit Rule 206

File Name 08a0242p.06

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

No. 07-1626

[Filed July 3, 2008]

TODD A. WHITE,
Plaintiff-Appellant,

v.

BAXTER HEALTHCARE CORPORATION,
Defendant-Appellee.

Appeal from the United States District Court
for the Eastern District of Michigan at Detroit.
No. 05-71201—John Feikens, District Judge.

Argued: March 12, 2008

Decided and Filed: July 3, 2008

Before: KEITH, CLAY, and GILMAN, Circuit Judges.

COUNSEL

ARGUED: Chrisdon F. Rossi, LAW OFFICES OF GARY ROSSI, Bloomfield Hills, Michigan, for Appellant. Noah A. Finkel, SEYFARTH SHAW, Chicago, Illinois, for Appellee. **ON BRIEF:** Gary A. Rossi, LAW OFFICES OF GARY ROSSI, Bloomfield Hills, Michigan, for Appellant. Noah A. Finkel, SEYFARTH SHAW, Chicago, Illinois, for Appellee.

CLAY, J., delivered the opinion of the court, in which KEITH, J., joined. GILMAN, J. (pp. 21-25), delivered a separate opinion concurring in part and dissenting in part.

OPINION

CLAY, Circuit Judge. Plaintiff, Todd A. White ("White"), an African-American, appeals the district court's grant of summary judgment in favor of Defendant, Baxter Healthcare Corporation ("Baxter"), on White's employment discrimination claims brought pursuant to Title VII of the Civil Rights Act of 1964 ("Title VII"), 42 U.S.C. § 2000e *et seq.* (2000), Section 101 of the Civil Rights Act of 1991, 42 U.S.C. § 1981 (2000), and Michigan's Elliot-Larsen Civil Rights Act (the "Elliot- Larsen Act"), Mich. Comp. Laws § 37.2101 *et seq.* (2002). In particular, White contends that he has presented sufficient evidence for a jury to conclude that he was discriminated against on the basis of his race when Baxter (1) failed to promote him, and (2) downgraded his 2004 performance evaluation. We agree, and, for the reasons that follow, we **REVERSE** the district court's grant of Baxter's motion for summary judgment and **REMAND** the case for trial.

I. BACKGROUND

Baxter, a subsidiary of Baxter International, Inc., produces and sells medical technologies related to the blood and circulatory systems. In April of 1998, Baxter purchased White's former employer, Ohmeda Pharmaceutical Products, Inc. ("Ohmeda"), and merged it into Baxter's Anesthesia, Critical Care, and Oncology ("ACCO") division. Since then, White has been a sales representative at Baxter, selling proprietary and generic pharmaceutical products to anesthesia professionals.[1] In January of 2001, White was promoted to the position of Teaching Center Specialist ("TCS"), a specialized sales representative who sells products to larger hospitals that run teaching programs and who is held to a higher standard of product knowledge and teaching skills.

During his first six years at Baxter, White was primarily supervised by Baxter Regional Manager Richard Clark ("Clark"), who also served as White's supervisor at Ohmeda prior to its merger with Baxter. White has not alleged, and the record does not reflect, that Clark harbors any discriminatory animus toward African-Americans. Beginning January 1, 2004, White was required to report to Tim Phillips ("Phillips"), Baxter Regional Manager of Northern Teaching Center Specialists, as his primary supervisor. Clark and Phillips, in turn, reported to Carl Gold ("Gold"),

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[1] At oral argument, White's counsel indicated that after the district court's ruling was issued in this case, Baxter terminated White's employment. The stated reasons for this termination do not appear in the record and were not explained by counsel at oral argument. However, it is sufficient to note that at all times relevant for this appeal, White was employed by Baxter.

the ACCO Area Vice President for Sales for the eastern half of the United States.

Soon after Phillips became his supervisor, White began to notice signs of a discriminatory animus toward African-Americans on the part of Phillips. For example, according to White, when he complained to Phillips about scheduling a work meeting on the Martin Luther King, Jr. holiday, Phillips responded by telling White that "nobody wants to be around a black man." J.A. at 106. Phillips had allegedly made a similar comment – "no one wants to work with a black man" – when talking about workforce diversity with another Baxter employee, Jacinta Toland, on a previous occasion. J.A. at 633. White also noted that, during one of their conversations, Phillips had referred to an African-American sales representative as "that black girl," rather than referring to her by her name, Tanisha Gabriel, or by her position title. Likewise, Phillips would occasionally answer White's calls in jest by saying "White, Todd" instead of calling White by just his first name as he would with other employees. Finally, White was disturbed when Phillips circulated an e-mail to Baxter employees which showed an image of Osama Bin Laden morphing into O.J. Simpson and which contained the subject line "I KNEW IT!!! I KNEW IT!!! I KNEW IT!!!"

In contrast to the racially discriminatory comments White heard from Phillips, his experience at Baxter prior to being supervised by Phillips was one in which he generally received positive recognition for his outstanding sales performance. In 2000, White was awarded membership in Baxter's Distinguished Sales Club ("DSC") which is reserved for the top five percent of Baxter sales representatives in the country.

Likewise, in 2001, White was placed in a TCS position, the highest sales position within Baxter. Finally, in 2003, White received a Sales Achievement Award and won a company-paid trip for being within the top twenty percent of sales representatives in the country. White was rated as "Meeting Expectations" in the years 2001 and 2002, and achieved the higher "Exceeding Expectations" rating in 2000 and 2003.[2]

Hoping to use his strong sales background to help Baxter's ACCO division perform even better, White applied for the position of ACCO Midwest Regional Manager in September of 2004. This was White's first, and only, application for a Regional Manager position at Baxter. Baxter had never previously hired any African-American managers (either regional or higher-ranked supervisors) within its ACCO division.

Gold was responsible for making the final hiring decision for the Regional Manager position. He enlisted Daryl Martin ("Martin"), Baxter Human Resources Director, and Carl Kunz ("Kunz"), ACCO Vice President for Sales for the western half of the United States, to assist him. Phillips was not formally

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[2] White's performance in the 2003 fiscal year was so strong that Clark, his supervisor at the time, wrote the following in White's November 25, 2003 field report:

> Todd I could not be happier with your results YTD. You currently rank #2 on the contest YTD within the Teaching Center Specialists. That is terrific. I know that you will finish the year at #1!!! You are well on your way to winning a trip once again! You are also on your way of [sic] becoming another DSC winner.

J.A. at 627.

involved in the Regional Manager selection process. However, according to Phillips, he encouraged White to apply for the position and told Gold that White would be "a good fit" for the job. J.A. at 175. Phillips also testified that he talked to Kunz about White's application, but his testimony does not indicate what was said during the conversation. Gold confirms that he spoke with Phillips about White. Yet, according to Gold, although Phillips had presented White as a potential management candidate in an internal development process called the Organized Talent Review ("OTR"), Phillips had "never really discussed the fact that [White] could move into a manager role." J.A. at 638.

As part of their selection process for the Regional Manager position, Gold, Martin, and Kunz interviewed White and four other candidates: Stacy Hord, Brett Corrick, Carey Redd, and Maggie Freed ("Freed"). White was the only African-American and the only applicant with a masters degree.[3] Freed, on the other hand, was the only woman interviewed for the position, and the only applicant who had not previously been a Baxter sales representative. In addition to interviewing the candidates, Gold, Martin, and Kunz also reviewed their resumes and prior performance evaluations and spoke to their regional managers. After the interviews were complete, Gold, Martin, and Kunz each ranked the candidates on their own before proceeding to a group discussion of them. All three interviewers ranked White last among the applicants. By contrast, the interviewers all ranked

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[3] White earned a Masters in Business Administration ("MBA") from Central Michigan University in April of 1994

Freed as the top candidate. Freed was subsequently promoted to the Regional Manager position.

In their depositions, Gold, Martin, and Kunz explained their reasons for ranking White and Freed in the manner that they did. While each interviewer described Freed as enthusiastic, well-prepared, and ready for management, none of them expressed a concern that Freed was the only candidate lacking experience as a Baxter sales representative. Kunz noted that Freed had some prior experience in hiring, training, and managing people. Gold likewise found Freed to be "a person who's extremely energetic, talking about the business in a positive way, talking about the company in a positive way, the great cheerleader for her people." J.A. at 641. Gold also noted that Freed "had done some homework" and "knew the personnel in that central north – central Midwest region." *Id.* Finally, Gold indicated that he had been impressed by the fact that Freed "had a plan in place to try to move the business forward right out of the gate" with specific goals of where she needed to go in the next thirty, sixty, and ninety days. *Id.* Neither Gold, Martin, nor Kunz commented on Freed's lack of sales experience.

In contrast to Freed, the interviewers viewed White as "extremely aggressive." J.A. at 354. They also expressed concerns about his alleged lack of management experience. They observed that, in his evaluations, White "was not referred to as a team player." J.A. at 638. They further claimed that White interviewed poorly, purportedly coming across as "confrontational" and not focused on the bigger picture of how to "turn the region around" and "move the business forward." J.A. at 640. In particular, Gold

noted that White had asked him "what have I [Gold] done to promote cultural diversity within the company," and explained that "I would have rather him told me what he was going to do, you know, what his plan was – plan of action, where he thought this business was going to do [sic], what he thought he would do in the region to change things because he knew the situation." J.A. at 354.

In late September of 2004, White was informed that he had not received the Regional Manager position. A few months later, White received more bad news in the form of his 2004 performance evaluation.

As a Baxter employee, White was subject to both mid-year and year-end performance reviews. In these reviews, Baxter employees are evaluated in terms of "performance management objectives" ("PMO") and "success factors." Prior to 2004, the ACCO division issued only three types of ratings for its sales representatives: "Exceeds Expectations," "Meets Expectations," or "Does Not Meet Expectations." A representative rated as "Does Not Meet" generally could not receive a pay raise. In 2004, ACCO created, for the first time, the categories of "Meets Plus" and "Meets Minus." The creation of this latter category was designed to permit a sales representative who did not meet his or her sales goals to avoid a "Does Not Meet" rating, and thus still receive a pay raise, albeit a smaller one than would be available for achieving the "Meets," "Meets Plus," or "Exceeds" ratings. The parties dispute the manner in which Baxter company policy dictated how these 2004 ACCO ratings should have been determined.

According to White, a TCS's performance each year was to be evaluated pursuant to the relevant PMO Grid. This PMO Grid is a matrix which includes a list of all products sold by the ACCO division as well as the national averages of sales representatives' sales numbers for each of those products. The grid further specifies which percentage of sales for each product correlates to an "Exceeds," "Meets Plus," "Meets," "Meets Minus," or "Does Not Meet" rating. The 2004 PMO Grid, which was issued in November of 2004, set forth the following standards for evaluating an individual TCS's performance:

> **Exceeds** = Achievement of Suprane 100% plus 2 other categories meeting 100%. Some activity in PSA is necessary.
>
> **Meets +** = 100% in 3 of 4 categories
>
> **Meets** = 100% in 2 of 4 categories (one must be Suprane or Brevibloc)
>
> **Meets -** = 100% in 2 of 4 categories
>
> **Does not meet** = anything less

J.A. at 672. The 2004 PMO Grid also specified that "merit raise payouts" would be awarded on the following percentage basis:

Exceeds	5%
Meets +	4%
Meets	3%
Meets -	2% or less
Does not meet	0

J.A. at 673. White claims that his 2004 performance should have been evaluated according to these standards.

Baxter, however, suggests that in addition to considering the 2004 PMO Grid, regional managers were required to consider the directions given by Gold in an e-mail (the "Gold E-Mail") sent on October 22, 2004. This e-mail was directed to all Baxter Regional Managers, including Phillips, and stated:

> After careful review of the Suprane numbers and percent to plan the following reps leave a lot to be desired regarding their Suprane sales number this year. The six reps combined are 89% to plan with Suprane through August 2004. In addition four of the reps are down for the month off their YTD number. Needless to say, this is not a good situation. . . . Our Area cannot afford to keep individuals in a territory who cannot get close to plan on our #1 detailed product. The reps are as follows:
>
> * * *
>
> Todd White
>
> * * *
>
> Our Area is 99% to plan as a team. As a group these reps are 10 percentage points below that and are killing our Suprane numbers. If these reps cannot bring their numbers up to a minimum of 95% to plan by years [sic] end than [sic] they will receive a DOES NOT MEET on

> their PMO, receive a "0" and be placed on a PIP [Performance Improvement Plan].

J.A. at 657.

During 2004, White sold four Baxter proprietary products: Suprane, an inhalation agent used for general anesthesia; Brevibloc, a beta-blocker used to help control a patient's heart rate; the Transdermal Delivery System ("TDS"), a drug delivery vehicle which enables rapid absorption of drugs; and the Patient State Analyzer ("PSA"), a device which assesses the response of patients during the admission of anesthesia. White's year-end sales numbers were as follows: Suprane, 92%; Brevibloc, 105%; TDS, 101%; and PSA, unknown. Based on his performance, White claims that he was entitled to a "Meets" evaluation under the 2004 PMO Grid. However, Phillips, as White's supervisor for the 2004 fiscal year, was responsible for evaluating his annual performance. In his year-end performance evaluation of White, which was completed in early 2005, Phillips issued White an overall rating of "Meets Minus" and offered the following explanation:

> Based on Todd's quantitative results, Todd has achieved a rating of "Does Not Meet". However, due to Todd"s [sic] diligence and commitment to the business that has been demonstrated by his focus on Suprane and his consistent work in the Region, I have moved this rating to a Meets(-). This has been a tough and challenging year for Todd White. Todd has had to fight for everything he achieved this year. It is my expectation that Todd will turn his business around in 2005. In 2005, I will expect that all

> special Marketing programs will be utilized in the designated time frame. In addition, at Mid-year 2005, I will expect that Todd is achieving budget in 2 of 4 categories, one of them being Suprane. Otherwise further corrective action may be needed. Todd has overachieved in the past so I know he is capable with a dedication of more focus on his Baxter ACC franchise.

J.A. at 670. As a result of this "Meets Minus" evaluation, White did receive a pay raise in 2004. This salary increase was not as high as it would have been if White had received a "Meets" evaluation.

Shortly after receiving his 2004 performance evaluation, White filed a complaint with the Equal Employment Opportunity Commission ("EEOC"). On February 3, 2005, the EEOC issued White a Right-To-Sue letter. White then filed the present action against Baxter in the United States District Court for the Eastern District of Michigan, alleging that Baxter had discriminated against him on the basis of his race in violation of Title VII, 42 U.S.C. § 2000e *et seq.*, Section 101 of the Civil Rights Act of 1991, 42 U.S.C. § 1981, and Michigan's Elliot-Larsen Act, Mich. Comp. Laws § 37.2101 *et seq*. In particular, White alleged that Baxter had discriminated against him by: (1) failing to promote him to a number of different positions, including the ACCO Midwest Regional Manager position; (2) denying him company benefits such as an interviewing skills class and stock options; and (3) downgrading his 2004 performance review. In his complaint, White also stated a claim of gender discrimination pursuant to Title VII and the Elliot-Larsen Act.

On March 31, 2006, Baxter filed a motion for summary judgment on all of White's claims. The district court then referred the case to a magistrate judge, who recommended that Baxter's motion be granted in its entirety. White filed objections to the magistrate judge's report and recommendations. However, on April 16, 2007, after conducting a *de novo* review of the record in light of White's objections, the district court adopted the magistrate judge's report and recommendations in full, granted Baxter's motion for summary judgment, and dismissed the case. *See White v. Baxter Healthcare Corp.*, No. 05-71201, 2007 WL 1119881 (E.D. Mich. Apr. 16, 2007).

On May 14, 2007, White filed this timely appeal. On appeal, White has abandoned his gender discrimination claim. He has likewise limited his race discrimination claim to challenging (1) Baxter's failure to promote him to the ACCO Midwest Regional Manager Position, and (2) his "Meets Minus" 2004 performance review.

II. STANDARD OF REVIEW

We review a district court's grant of summary judgment *de novo*. *Mutchler v. Dunlap Memorial Hospital*, 485 F.3d 854, 857 (6th Cir. 2007). Summary judgment is proper "if the pleadings, the discovery and disclosure materials on file, and any affidavits show that there is no genuine issue as to any material fact and that the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c). A genuine issue of material fact exists when there are "disputes over facts that might affect the outcome of the suit under the governing law." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). However, "[w]here the record

taken as a whole could not lead a rational trier of fact to find for the non-moving party, there is no 'genuine issue for trial.'" *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986) (quoting *First Nat. Bank of Arizona v. Cities Servs. Co.*, 391 U.S. 253, 289 (1968)).

At the summary judgment stage, the moving party bears the initial burden of identifying those parts of the record which demonstrate the absence of any genuine issue of material fact. *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986). However, if the moving party seeks summary judgment on an issue for which it does not bear the burden of proof at trial, the moving party may meet its initial burden by showing "that there is an absence of evidence to support the nonmoving party's case." *Id.* at 325. When the moving party has carried forward this burden, "its opponent must do more than simply show that there is some metaphysical doubt as to the material facts." *Matsushita*, 475 U.S. at 586. The non-moving party may not rest upon its mere allegations or denials of the adverse party's pleadings, but rather must set forth specific facts showing that there is a genuine issue for trial. *Id.*; *accord* Fed. R. Civ. P. 56(e)(2).

After the parties have presented the evidence, "the judge's function is not himself to weigh the evidence and determine the truth of the matter, but to determine whether there is a genuine issue for trial." *Anderson*, 477 U.S. at 249. In evaluating the evidence, the court must draw all inferences in the light most favorable to the non-moving party. *Matsushita*, 475 U.S. at 587. However, "the mere existence of a scintilla of evidence in support of the [non-moving party's] position will be insufficient [to defeat a motion for

summary judgment]; there must be evidence on which the jury could reasonably find for the" non-moving party. *Anderson*, 477 U.S. at 252.

III. DISCUSSION

White challenges the district court's dismissal of two distinct race discrimination claims. First, White disputes the grant of summary judgment to Baxter on his claim that Baxter failed to promote him to the ACCO Midwest Regional Manager position on account of his race. Second, White contests the district court's conclusion that he has produced insufficient evidence to show that his race was a motivating factor in Phillips' decision to downgrade his 2004 performance evaluation. We consider each of these arguments in turn.

A. Failure to Promote Claim

White first alleges that Baxter violated Title VII by failing to promote him on account of his race. White brings this challenge pursuant to Title VII's general anti-discrimination provision, 42 U.S.C. § 2000e-2(a)(1),[4] 42 U.S.C. § 1981, and Michigan's Elliot-Larsen Act. Title VII's anti-discrimination provision makes it "an unlawful employment practice for an employer . . . to discriminate against any individual with respect to his compensation, terms, conditions, or

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[4] White has presented his failure to promote claim as a single-motive discrimination claim brought pursuant only to 42 U.S.C. § 2000e-2(a)(1). Thus, we do not analyze his claim under the unique mixed-motive summary judgment analysis that is appropriate for claims brought pursuant to 42 U.S.C. § 2000e-2(m). *See infra* section III.B.

privileges of employment, because of such individual's race, color, religion, sex, or national origin." 42 U.S.C. § 2000e-2(a)(1). Similarly, § 1981 guarantees that "[a]ll persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts . . . as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other." 42 U.S.C. § 1981. Likewise, § 202 of the Elliot-Larsen Act provides that "[a]n employer shall not . . . [f]ail or refuse to hire or recruit, discharge, or otherwise discriminate against an individual with respect to employment compensation, or a term, condition or privilege of employment, because of religion, race, color, national origin, age, sex, height, weight, or marital status." Mich. Comp. Laws § 37.2202(1)(a).

Absent direct evidence of discrimination,[5] claims

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[5] In general, a Title VII plaintiff may establish a case of unlawful discrimination through either direct or circumstantial evidence. We have explained the difference between these two types of evidence as follows:

> Direct evidence of discrimination is "that evidence which, if believed, requires the conclusion that unlawful discrimination was at least a motivating factor in the employer's actions." *Jacklyn v. Schering-Plough Healthcare Prods. Sales Corp.*, 176 F.3d 921, 926 (6th Cir. 1999). Circumstantial evidence, on the other hand, is proof that does not on its face establish discriminatory animus, but does allow a factfinder to draw a reasonable inference that discrimination occurred. *Kline* [*v. Tenn. Valley Auth.*, 128 F.3d 337, 348 (6th Cir. 1997)].

brought pursuant to Title VII's anti-discrimination provision, § 1981, and the Elliot-Larsen Act are subject to the tripartite burden-shifting framework first announced by the Supreme Court in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973), and subsequently modified in *Texas Dept. of Comm. Affairs v. Burdine*, 450 U.S. 248 (1981). *See, e.g., Lindsay v. Yates*, 498 F.3d 434, 440 n.7 (6th Cir. 2007) ("The *McDonnell Douglas / Burdine* framework applies only when discrimination plaintiffs rely on circumstantial evidence to prove their claims."); *Jackson v. Quanex Corp.*, 191 F.3d 647, 658 (6th Cir. 1999) ("We review claims of alleged race discrimination brought under § 1981 and the Elliot-Larsen Act under the same standards as claims of race discrimination brought under Title VII."). Under this framework, the plaintiff bears the initial "not onerous" burden of establishing a *prima facie* case of discrimination by a preponderance of the evidence. *Burdine*, 450 U.S. at 253. To establish a *prima facie* case of employment discrimination, a plaintiff must demonstrate that: (1) he is a member of a protected class; (2) he was qualified for his job; (3) he suffered an adverse employment decision; and (4) he was replaced by a person outside the protected class or treated differently than similarly situated non-protected employees. *Arendale v. City of Memphis*, 519 F.3d 587, 603 (6th Cir. 2008); *accord Clay v. United Parcel Serv., Inc.*, 501 F.3d 695, 703 (6th Cir. 2007); *see also Lind v. City of Battle Creek*, 681 N.W.2d 334, 338 (Mich. 2004) (confirming that the *McDonnell Douglas* test for a *prima facie* case applies to claims brought pursuant to

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Wexler v. White's Fine Furniture, Inc., 317 F.3d 564, 570 (6th Cir. 2003) (en banc).

the Elliot-Larsen Act); *Hazle v. Ford Motor Co.*, 628 N.W.2d 515, 521 (Mich. 2001) (same); *Lytle v. Malady*, 579 N.W.2d 906, 914 & n.19 (Mich. 1998) (describing the fourth part of the *prima facie* case as requiring the plaintiff to show that he "was discharged under circumstances that give rise to an inference of unlawful discrimination," but explaining that "[t]his four part test is an adaptation of the United States Supreme Court's *McDonnell Douglas* test to prove a prima facie case of discrimination"). Once the plaintiff establishes this *prima facie* case, the burden shifts to the defendant to offer evidence of a legitimate, non-discriminatory reason for the adverse employment action. *Burdine*, 450 U.S. at 253; *McDonnell Douglas*, 411 U.S. at 802. Finally, if the defendant succeeds in this task, the burden shifts back to the plaintiff to show that the defendant's proffered reason was not its true reason, but merely a pretext for discrimination. *Burdine*, 450 U.S. at 253; *see Manzer v. Diamond Shamrock Chemicals Co.*, 29 F.3d 1078, 1083 (6th Cir. 1994) ("[O]nce the employer has come forward with a nondiscriminatory reason for [its actions] the plaintiff must produce sufficient evidence from which the jury may reasonably reject the employer's explanation."). Although the burdens of production shift, the ultimate burden of persuading the trier of fact that the defendant intentionally discriminated against the plaintiff remains at all times with the plaintiff. *See Burdine*, 450 U.S. at 256.

In the instant case, Baxter has conceded that White has established a *prima facie* case of race discrimination. *See White*, 2007 WL 1119881, at *14 ("The parties appear to agree that Plaintiff is able to satisfy his *prima facie* case."); J.A. at 81-82 (Defendant Baxter Healthcare Corporation's Memorandum of Law

on Its Motion for Summary Judgment) (failing to argue that White has not established his *prima facie* case and instead arguing that White cannot demonstrate pretext); Def. Br. at 22-24 (same). In response, however, Baxter offers an allegedly non-discriminatory reason for its promotion of Freed instead of White to the ACCO Midwest Regional Manager position:

> Baxter selected Freed instead of White because, as Sales Training Manager, Freed had managed direct reports, had dotted-line managerial experience with respect to a very large group of field sales trainers, and performed a large amount of training; she had worked in human resources and performed management and leadership training; she was well-prepared for the interview with specific objectives for turning around the region, and was enthusiastic and demonstrated confidence and a high energy level during her interview. Indeed, as Sales Training Manager, Freed hired, trained, and managed the sales training efforts of 14 to 16 national field trainers for both pharmaceuticals and devices, managed two direct reports, and had developed and implemented training programs. During the course of her employment, she won three trips for sales, and was rated "exceeds expectations" for several years. White lacked this managerial experience and did not interview well: in the view of the interviewers, he was "in-your-face" aggressive, demonstrated an inflexible management style, and did not present a persuasive plan for turning around the region.

Def. Br. at 22-23 (citations to record omitted).

We consider this proffered explanation for the failure to promote White to be facially legitimate and non-discriminatory. Baxter's alleged reason for its promotion decision is "clear and reasonably specific," *Burdine*, 450 U.S. at 258, and is arguably supported by "admissible evidence which would allow the trier of fact rationally to conclude that the employment decision [was] not motivated by discriminatory animus," *id.* at 257. Thus, we turn to the final part of the *McDonnell Douglas / Burdine* analysis: White's showing of pretext. Baxter contends, and the district court found, that White has failed to produce sufficient evidence to convince a jury that Baxter's explanation of its reason for not promoting White was merely prextextual. We disagree.

Pretext may be established "either directly by persuading the [trier of fact] that a discriminatory reason more likely motivated the employer or indirectly by showing that the employer's proffered explanation is unworthy of credence." *Burdine*, 450 U.S. at 256. A plaintiff will usually demonstrate pretext by showing that the employer's stated reason for the adverse employment action either (1) has no basis in fact, (2) was not the actual reason, or (3) is insufficient to explain the employer's action. *See Imwalle v. Reliance Med. Prods., Inc.*, 515 F.3d 531, 545 (6th Cir. 2008) (citing *Manzer*, 29 F.3d at 1084). However, the plaintiff may also demonstrate pretext by offering evidence which challenges the reasonableness of the employer's decision "to the extent that such an inquiry sheds light on whether the employer's proffered reason for the employment action

was its actual motivation."[6] *Wexler v. White's Fine*

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[6] Contrary to what Judge Gilman maintains, our Circuit has never adopted a "business-judgment rule" which requires us to defer to the employer's "reasonable business judgment" in Title VII cases. Dissenting Op. at 23-24. Indeed, in most Title VII cases the very issue in dispute is whether the employer's adverse employment decision resulted from an objectively unreasonable business judgment, *i.e.*, a judgment that was based upon an impermissible consideration such as the adversely-affected employee's race, gender, religion, or national origin. In determining whether the plaintiff has produced enough evidence to cast doubt upon the employer's explanation for its decision, we cannot, as Judge Gilman does, unquestionably accept the employer's own self-serving claim that the decision resulted from an exercise of "reasonable business judgment." Dissenting Op. at 24. Nor can we decide "as a matter of law" that "an employer's proffered justification is reasonable." Dissenting Op. at 24. The question of whether the employer's judgment was reasonable or was instead motivated by improper considerations is for the *jury* to consider. Our role is merely to assess whether the plaintiff has presented enough evidence for a reasonable jury to accept the plaintiff's claim that the employer made an unlawful business decision. *See Anderson*, 477 U.S. at 249 ("[A]t the summary judgment stage the judge's function is not himself to weigh the evidence and determine the truth of the matter but to determine whether there is a genuine issue for trial.").

One way in which the plaintiff may raise doubts about the lawfulness of the employer's business decision is by suggesting that the decision itself was unreasonable. Thus, in *Smith v. Chrysler Corp.*, we expressly found that an employee may demonstrate that the employer's proffered explanation for its decision is a mere pretext for discrimination by showing that "the employer failed to make a reasonably informed and considered business decision, thereby making its decisional process 'unworthy of credence.'" 155 F.3d 799, 807-808 (6th Cir. 1998). Likewise, in *Wexler*, we confirmed that "the reasonableness of an employer's decision may be considered to the extent that such an inquiry sheds light on whether the employer's proffered reason for the

Furniture, Inc., 317 F.3d 564, 578 (6th Cir. 2003) (en banc); *see also Burdine*, 450 U.S. at 259 ("The fact that a court may think that the employer misjudged the qualifications of applicants does not in itself expose him to Title VII liability, *although this may be probative of whether the employer's reasons are pretexts for discrimination.*" (emphasis added)); *Loeb v. Textron, Inc.*, 600 F.2d 1003, 1012 n.6 (1st Cir. 1979) ("The reasonableness of the employer's reasons may of course be probative of whether they are pretexts. The more idiosyncratic or questionable the employer's reason, the easier it will be to expose as a pretext, if indeed it is one."). As the D.C. Circuit has aptly observed:

> If a factfinder can conclude that a reasonable employer would have found the plaintiff to be significantly better qualified for the job, but this employer did not, the factfinder can legitimately infer that the employer consciously selected a less-qualified candidate – something employers do not usually do, unless some other strong consideration, such as discrimination, enters into the picture.

Aka v. Washington Hosp. Ctr., 156 F.3d 1284, 1294 (D.C. Cir. 1998).

In the instant case, we find that White has produced enough evidence for a reasonable jury to

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employment action was its actual motivation." 317 F.3d at 578. Inasmuch as Judge Gilman reads this precedent as creating an employer-deferent "business-judgment rule," it is he, not us, who is misconstruing the law. Dissenting Op. at 23.

infer that Baxter's proffered explanation for its hiring decision may be merely a pretext for unlawful discrimination. In particular, we find that the evidence presented could lead a jury to doubt the reasonableness of Baxter's decision to hire Freed instead of White, and thereby to infer that some other impermissible motivation – such as White's race – guided the employment decision.

The record undisputedly demonstrates that White possessed some qualifications for managerial work which Freed did not. For example, White was the only applicant for the ACCO Regional Manger position who had gone to graduate school to earn an MBA. Likewise, in stark contrast to Freed, White had several years of experience as an ACCO sales representative and TCS. During these years, White was consistently rated as a high performer and had the opportunity to become very familiar with all of the products sold by the division as well as the challenges faced in selling such products. Finally, White had significant prior sales management experience from a job at Johnson & Johnson, Inc. ("Johnson & Johnson") where he "[m]anaged five sales representatives . . . [p]articipated in initial sales training, conducted district meetings, and [was] responsible for recruitment and interviewing." J.A. at 505.

We find that this evidence of White's arguably superior qualifications for the ACCO regional manager position, in and of itself, could lead a jury to doubt the justifications given for Baxter's hiring decision. At minimum, White has created a genuine issue of material fact concerning the reasonableness of Baxter's decision. Indeed, Baxter itself concedes that "White certainly had several positive aspects to his

candidacy, and [that] Freed would have presented an even stronger candidacy if she had experience selling Baxter pharmaceutical products." Def. Br. at 24 n.11. Nevertheless, Baxter argues that it was appropriate for all three interviewers to rank White last among the candidates, and thus eventually deny him the promotion, because of his allegedly poor performance during the interview and because of Freed's allegedly more extensive managerial experience.

Yet, viewing the record in the light most favorable to White, as we must,[7] we find that a jury could reasonably disbelieve both of these proffered explanations. First, any evaluation of White's interview performance is an inherently subjective determination, and thus easily susceptible to manipulation in order to mask the interviewer's true reasons for making the promotion decision. Indeed, since the very issue in dispute is whether the reasons given by these interviewers for their decision should be believed, it would be highly inappropriate for us to assume, as Judge Gilman does, that their own subjective perceptions of White were accurate. Moreover, we find Gold, Martin, and Kunz's

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[7] Unlike Judge Gilman, whose analysis seeks to minimize White's objective qualifications for the Regional Manager position while bolstering the subjective views of the Baxter decision-makers, *see* Dissenting Op. at 22-23, we do not waste judicial resources in crafting a reading of the evidence that is most favorable to the defendant-employer and most hostile to the plaintiff-employee. Rather, we follow the Supreme Court's command to view "the inferences to be drawn from the underlying facts . . . in the light most favorable to the party opposing the motion" for summary judgment. *Matsushita*, 475 U.S. at 587 (quoting *United States v. Diebold, Inc.*, 369 U.S. 654, 655 (1962)).

statements indicating that White came across as aggressive and lacking in management vision to be self-serving and conclusory. The only factually based explanation of why White might have appeared aggressive to the interviewers comes from Gold, who recounts how he was disturbed by White's questions about Baxter's lack of workforce diversity, particularly within its management positions. However, in light of White's overall claim that he was discriminated against on the basis of his race, we believe that a reasonable juror could find suspect White's interviewers' perception of such a question as "aggressive."

Second, Baxter's claim that Freed possessed significantly more experience than White appears overblown. Again, it is notable that Freed had no prior experience as a Baxter sales representative and, in all likelihood, was less familiar than was White with the specific challenges faced by the ACCO division in promoting Baxter's products. While the record does reflect that Freed had some prior management experience in Baxter's Medication Delivery division, the record does not support Baxter's self-serving contention that this management experience was significantly more extensive than White's own prior sales management experience at Johnson & Johnson. Moreover, during her interview, Freed admitted that she had previously found it difficult to confront subordinates while in a managerial role. In particular, Freed described an incident in which she feared confronting a Baxter employee about his chronic tardiness. We find that a juror considering such evidence could reasonably conclude that Baxter's claim that Freed was more qualified than White for the ACCO Regional Manager position is not based in fact.

In sum, we find that White has offered sufficient evidence to suggest that Baxter's purported reason for not promoting him – namely, Freed's better qualifications for the Regional Manager position – has no basis in fact, did not actually motivate Baxter's decision, or is not sufficient to explain its hiring choice. *See Imwalle*, 515 F3d at 545. Accordingly, we hold that White has met his *McDonnell Douglas / Burdine* burden of producing enough evidence to convince a reasonable jury that Baxter's proffered reasons for not promoting him may have been a mere pretext for racial discrimination, and thus, Baxter is not entitled to summary judgment on White's failure to promote claim.

B. Downgraded Performance Evaluation Claim

In his second claim, White alleges that Baxter violated Title VII by intentionally downgrading his 2004 performance evaluation because White is an African-American. In particular, White claims that Phillips' decision to give him a "Meets Minus" rating, as opposed to the "Meets" rating to which White claims he was entitled, was motivated, at least in part, by White's race. In other words, White challenges his allegedly downgraded performance evaluation under a mixed-motive theory pursuant to 42 U.S.C. § 2000e-2(m). This section of Title VII permits a plaintiff to show that the defendant has engaged in an unlawful employment practice by "demonstrat[ing] that race, color, religion, sex, or national origin was a motivating factor for [the] employment practice, even though other factors also motivated the practice." 42 U.S.C. § 2000e-2(m).

White supports his mixed-motive claim with circumstantial, rather than direct, evidence. Our Circuit, however, has not yet determined the proper summary judgment framework to apply to a Title VII mixed-motive claim supported by circumstantial evidence.[8] *See Tysinger v. Police Dept. of City of Zanesville*, 463 F.3d 569, 578 (6th Cir. 2006) (refusing to decide "whether the evidence [in a Title VII mixed-motive case] is evaluated in terms of *prima facie* case elements, pretext requirements, or a mixed-motive analysis apart from the *McDonnell Douglas* framework" because "[u]nder any of these constructs, [the plaintiff]'s evidence clearly falls short of creating a genuine issue of material fact"); *Wright v. Murray Guard, Inc.*, 455 F.3d 702, 713 n.4 (6th Cir. 2006) ("Because . . . the facts of the instant case do not require resolution of the question, we refrain today from announcing a new or modified framework for

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[8] In the case of a mixed-motive claim supported by direct evidence of discrimination, the summary judgment analysis is rather simple. To survive a defendant's summary judgment motion, the plaintiff must have produced "sufficient evidence for a reasonable jury to conclude, by a preponderance of the evidence, that 'race, color, religion, sex, or national origin was a motivating factor for any employment practice.'" *Desert Palace, Inc. v. Costa*, 539 U.S. 90, 101 (2003) (quoting 42 U.S.C. § 2000e-2(m)). However, in the case of a mixed-motive claim supported by circumstantial evidence of an employer's discriminatory motive, the question arises whether we should apply the *McDonnell Douglas / Burdine* burden-shifting framework which we use to analyze single-motive Title VII claims supported by circumstantial evidence. *See Wright v. Murray Guard, Inc.*, 455 F.3d 702, 712 (6th Cir. 2006) ("[N]ow that such mixed-motive claims can be brought based on circumstantial evidence, the question arises as to the effect of *Desert Palace* on the analysis of mixed-motive claims at the summary judgment stage.").

evaluation of mixed-motive claims at the summary judgment stage."). Accordingly, we must begin our discussion of White's downgraded performance evaluation claim with a consideration of the appropriate summary judgment framework to apply to mixed-motive claims brought pursuant to 42 U.S.C. § 2000e-2(m).

1. Summary Judgment Framework for Title VII Mixed-Motive Claims

Since 1964, Title VII has made it an "unlawful employment practice for an employer . . . to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin." 42 U.S.C. § 2000e-2(a)(1). Discrimination claims brought pursuant to this section are traditionally categorized as either single-motive claims, *i.e.*, where an illegitimate reason motivated an employment decision, or mixed-motive claims, *i.e.*, where both legitimate and illegitimate reasons motivated the employer's decision. *Wright*, 455 F.3d at 711. This distinction was first recognized by the Supreme Court in *Price Waterhouse v. Hopkins*, when it considered the issue of whether an employment decision is made "because of" a protected characteristic in a "mixed-motive" case. 490 U.S. 228, 240 (1989). A divided Court found that, while Title VII prohibits an employer from taking a protected characteristic into account at all when making an employment decision, an employer could avoid liability under the statute by demonstrating that it would have made the same employment decision even if it had not taken into account the protected characteristic. *See id.* at 242 (plurality opinion).

In response to the *Price Waterhouse* decision and other Title VII decisions, Congress passed the Civil Rights Act of 1991. *See Landgraf v. USI Film Products*, 511 U.S. 244, 250 (1994). Among other things, section 107 of this act created an alternative method of demonstrating an unlawful employment practice:

> Except as otherwise provided in this subchapter, an unlawful employment practice is established when the complaining party demonstrates that race, color, religion, sex, or national origin was a motivating factor for any employment practice, even though other factors also motivated the practice.

42 U.S.C. § 2000e-2(m). The purpose and effect of this section was "to eliminate the employer's ability to escape liability in Title VII mixed-motive cases by proving that it would have made the same decision in the absence of the discriminatory motivation." *Hill v. Lockheed Martin Logistics Mgmt., Inc.*, 354 F.3d 277, 284 (4th Cir. 2004) (en banc); *accord Wright*, 455 F.3d at 711. Under the statute, such proof only enables the employer to limit the remedies available to the plaintiff-employee for the Title VII violation. *See* 42 U.S.C. § 2000e-5(g)(2)(B) (prohibiting damages awards and allowing only the grant of declaratory relief, injunctive relief, and attorney's fees when the defendant-employer proves that it would have taken the same action in the absence of the impermissible motivating factor).

For the first decade after the enactment of 42 U.S.C. § 2000e-2(m), many federal courts required a Title VII plaintiff asserting a mixed-motive claim

under this section to produce direct, as opposed to circumstantial, evidence that consideration of a protected characteristic was a motivating factor in the challenged employment decision. *See, e.g.*, *Wexler*, 317 F.3d at 571 ("Under this mixed-motive analysis, the plaintiff must produce *direct* evidence that the employer considered impermissible factors when it made the adverse employment decision at issue." (emphasis added) (citing *Price Waterhouse*, 490 U.S. at 244-46)); *Taylor v. Virginia Union Univ.*, 193 F.3d 219, 232 (4th Cir. 1999) ("A plaintiff qualifies for the more advantageous standard of liability applicable in mixed-motive cases if the plaintiff presents 'direct evidence that decision makers placed substantial negative reliance on an illegitimate criterion.'" (citation omitted)). As mixed-motive plaintiffs were not allowed to demonstrate their claims through circumstantial evidence, these courts did not even consider whether such plaintiffs should be required to satisfy the *McDonnell Douglas / Burdine* burden shifting framework in order to reach a jury.[9] *See Trans World*

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[9] As already noted, *see supra* section III.A, under the *McDonnell Douglas / Burdine* framework, a Title VII plaintiff seeking to prove a claim of single-motive discrimination by means of circumstantial evidence must survive a series of shifting burdens of production:

> First, the plaintiff has the burden of proving by the preponderance of the evidence a *prima facie* case of discrimination. Second, if the plaintiff succeeds in proving the *prima facie* case, the burden shifts to the defendant "to articulate some legitimate, nondiscriminatory reason for the employee's rejection." Third, should the defendant carry this burden, the plaintiff must then have an opportunity to prove by a preponderance of the evidence

Airlines, Inc. v. Thurston, 469 U.S. 111, 121 (1985) ("[T]he *McDonnell Douglas* test is inapplicable where the plaintiff presents direct evidence of discrimination."); *Wright*, 455 F.3d at 716 (Moore, J., concurring) ("Our pre- *Desert Palace* view that direct evidence was required to establish a mixed-motive case, kept mixed-motive claims distinct from claims analyzed under the *McDonnell Douglas* framework, which was applied when the plaintiff relied on circumstantial evidence.").

In *Desert Place, Inc. v. Costa*, the Supreme Court altered this practice by finding that a plaintiff may prove a Title VII mixed-motive case by either direct or circumstantial evidence. 539 U.S. 90, 92 (2003). Relying on the plain text of 42 U.S.C. § 2000e-2(m), the Court held that in order to obtain a mixed-motive jury instruction, "a plaintiff need only present sufficient evidence for a reasonable jury to conclude, by a preponderance of the evidence, that 'race, color, religion, sex, or national origin was a motivating factor for any employment practice.'" *Id.* at 101 (quoting 42 U.S.C. § 2000e-2(m)). However, as the issue in *Desert Palace* concerned a jury-instruction challenge, the Court did not consider whether the *McDonnell Douglas / Burdine* burden-shifting framework should apply to the pretrial summary judgment analysis of mixed-motive discrimination claims based on

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that the legitimate reasons offered by the defendant were not its true reasons, but were a pretext for discrimination.

Burdine, 450 U.S. at 252. In order to survive a defendant's motion for summary judgment, the single-motive Title VII plaintiff must produce sufficient evidence to overcome these burdens of production.

circumstantial evidence in the same way that it applies to single-motive discrimination claims based on circumstantial evidence. *See Tysinger*, 463 F.3d at 577; *Suits v. Heil*, 192 F. App'x 399, 408 (6th Cir. 2006) (unpublished).

Since *Desert Palace*, the federal courts of appeals have, without much, if any, consideration of the issue, developed widely differing approaches to the question of how to analyze summary judgment challenges in Title VII mixed-motive cases. *See generally Wright*, 455 F.3d at 716-19 (Moore, J., concurring) (discussing and evaluating the responses of our sister circuits to the Supreme Court's decision in *Desert Palace*). The Eighth Circuit has explicitly held that the *McDonnell Douglas / Burdine* burden-shifting framework applies to the summary judgment analysis of mixed-motive claims after *Desert Palace*. *See Griffith v. City of Des Moines*, 387 F.3d 733, 736 (8th Cir. 2004) ("[W]e conclude that *Desert Palace* had *no* impact on prior Eighth Circuit summary judgment decisions."). The Eleventh Circuit seems to have joined the Eighth Circuit in this regard. *See Burnstein v. Emtel, Inc.*, 137 F. App'x 205, 209 n.8 (11th Cir. 2005) (unpublished) (suggesting that the *McDonnell Douglas* analysis continues to apply in mixed-motive cases without modification post-*Desert Palace*); *Cooper v. Southern Co.*, 390 F.3d 695, 725 n.17 (11th Cir. 2004) (rejecting an argument that "the *McDonnell Douglas* burden-shifting analysis . . . was radically revised by the Supreme Court in *Desert Palace*" and noting that "after *Desert Palace* was decided, this Court has continued to apply the *McDonnell Douglas* analysis in non-mixed-motive cases").

The Fifth Circuit, in contrast, has adopted a "modified *McDonnell Douglas*" approach, under which a plaintiff in a mixed-motive case can rebut the defendant's legitimate non-discriminatory reason not only through evidence of pretext (the traditional *McDonnell Douglas / Burdine* burden), but also with evidence that the defendant's proffered reason is only one of the reasons for its conduct (the mixed-motive alternative). *See Machinchick v. PB Power, Inc.*, 398 F.3d 345, 352 (5th Cir. 2005); *Rachid v. Jack in the Box, Inc.*, 376 F.3d 305, 312 (5th Cir. 2004).

Adopting a sort of middle ground between these two positions are the Fourth and Ninth Circuits which permit a mixed-motive plaintiff to avoid a defendant's motion for summary judgment by proceeding either under the "pretext framework" of the traditional *McDonnell Douglas / Burdine* analysis or by "presenting direct or circumstantial evidence that raises a genuine issue of material fact as to whether an impermissible factor such as race motivated [, at least in part,] the adverse employment decision." *Diamond v. Colonial Life & Accident Ins. Co.*, 416 F.3d 310, 318 (4th Cir. 2005); *see Hill*, 354 F.3d at 284-85; *McGinset v. GTE Serv. Corp.*, 360 F.3d 1103, 1122 (9th Cir. 2004) (finding that a mixed-motive plaintiff "may proceed using the *McDonnell Douglas* framework, or alternatively, may simply produce direct or circumstantial evidence demonstrating that a discriminatory reason more likely than not motivated" the employment decision). The D.C. Circuit appears to have recently joined this middle ground approach. *See Fogg v. Gonzales*, 492 F.3d 447, 451 & n* (D.C. Cir. 2007) (indicating that "a plaintiff can establish an unlawful employment practice by showing that 'discrimination or retaliation played a "motivating

part" or was a "substantial factor" in the employment decision'" but noting that a "plaintiff may also, of course, use evidence of pretext and the *McDonnell Douglas* framework to prove a mixed-motive case").

Failing to adopt any of these views, the First, Third, and Tenth Circuits have refrained from deciding whether the *McDonnell Douglas* framework applies to mixed-motive claims. *See Houser v. Carpenter Tech. Corp.*, 216 F. App'x 263, 265 (3d Cir. 2007) (unpublished) (refusing to decide the issue because the plaintiff had failed to produce sufficient evidence to survive summary judgment under any mixed-motive standard); *Furas v. Citadel Comm. Corp.*, 168 F. App'x 257, 260 (10th Cir. 2006) (unpublished) (refusing to decide the issue because the plaintiff failed to properly preserve the argument for appeal); *Rodriguez v. Sears Roebuck de Puerto Rico, Inc.*, 432 F.3d 379, 380-81 (1st Cir. 2005); *Hillstron v. Best Western TLC Hotel*, 354 F.3d 27, 31 (1st Cir. 2003). Finally, the Second and Seventh Circuits appear not to have even considered this issue.

Our Circuit, like the First, Third, and Tenth Circuits, has yet to resolve the question of the appropriate framework to apply to Title VII mixed-motive claims at the summary judgment stage despite having been presented with the issue in five (two published, three unpublished) prior cases. *See Tysinger*, 463 F.3d at 578 (finding it unnecessary to consider whether the *McDonnell Douglas* framework still applies in analyzing mixed-motive summary judgment challenges because the plaintiff's evidence failed to create a genuine issue of material fact on the question of whether discriminatory animus was a motivating factor in the employment decision); *Wright*,

455 F.3d at 712-13 (same); *Suits*, 192 F. App'x at 408 (finding that "whatever the import of *Desert Palace* . . . [m]ixed motive analysis cannot apply here because plaintiff has failed to come forward with evidence from which a trier of fact could find that discrimination was even partly a motivation for her termination"); *Aquino v. Honda of America, Inc.*, 158 F. App'x 667, 674-76 (6th Cir. 2005) (unpublished) (failing to address the impact of *Desert Palace* on Title VII claims, but holding that "*Desert Palace* does not modify *McDonnell Douglas* in employment discrimination lawsuits filed under § 1981"); *Harris v. Giant Eagle, Inc.*, 133 F. App'x 288, 297 (6th Cir. 2005) (unpublished) (finding it unnecessary to address "the question of whether the *McDonnell Douglas* burden-shifting framework should be modified in the wake of *Desert Palace*" because the plaintiff had not set forth sufficient evidence from which a jury could reasonably infer that race was a motivating factor in the employment decision). *But see Wright*, 455 F.3d at 720-21 (Moore, J., concurring) (proposing that we resolve the issue by finding that the *McDonnell Douglas* framework does not apply to mixed-motive claims based on circumstantial evidence).

This case now presents us with the opportunity to finally clarify how Title VII mixed-motive claims should be analyzed at the summary judgment stage. We do so by holding that the *McDonnell Douglas / Burdine* burden-shifting framework does *not* apply to the summary judgment analysis of Title VII mixed-motive claims.[10] We likewise hold that to survive a

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[10] However, as is clear from section III.A of this opinion, the *McDonnell Douglas / Burdine* framework continues to guide our

defendant's motion for summary judgment, a Title VII plaintiff asserting a mixed-motive claim need only produce evidence sufficient to convince a jury that: (1) the defendant took an adverse employment action against the plaintiff; and (2) "race, color, religion, sex, or national origin was *a* motivating factor" for the defendant's adverse employment action. 42 U.S.C. § 2000e-2(m) (emphasis added). *See Wright*, 455 F.3d at 716 (Moore, J., concurring) ("[A]n employee raising a mixed-motive claim can defeat an employer's motion for summary judgment by presenting evidence – either direct or circumstantial – to 'demonstrate' that a protected characteristic 'was a *motivating factor* for an employment practice, even though other factors also motivated the practice.'" (quoting 42 U.S.C. § 2000e-2(m))). This burden of producing some evidence in support of a mixed-motive claim is not onerous and should preclude sending the case to the jury only where the record is devoid of evidence that could

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summary judgment analysis of single-motive discrimination claims brought pursuant only to Title VII's general anti-discrimination provision, 42 U.S.C. § 2000e-2(a)(1), and not pursuant to 42 U.S.C. § 2000e-2(m). We decline to adopt the view, proposed by some courts and commentators, that the *McDonnell Douglas / Burdine* framework has ceased to exist entirely following *Desert Palace*. *See, e.g., Dare v. Wal-Mart Stores, Inc.*, 267 F. Supp.2d 987 (D. Minn. 2003); Jeffrey A. Van Detta, *"Le Roi est Mort; Vive le Roi!": An Essay on the Quiet Demise of* McDonnell Douglas *and the Transformation of Every Title VII Case After* Desert Palace, Inc. v. Costa *Into a "Mixed- Motives" Case*, 52 DRAKE L. REV. 71 (2003); William R. Corbett, McDonnell Douglas, *1973-2003: May You Rest In Peace?*, 6 U. PA. J. LAB. & EMP. L. 199 (2003). Indeed, post-*Desert Palace*, the Supreme Court has continued to apply the *McDonnell Douglas / Burdine* analysis to summary judgment challenges in single-motive Title VII cases. *See Raytheon Co. v. Hernandez*, 540 U.S. 44, 53-54 (2003).

reasonably be construed to support the plaintiff's claim. *See Anderson*, 477 U.S. at 252. Moreover, as it is irrelevant, for purposes of a summary judgment determination, whether the plaintiff has presented direct or circumstantial evidence in support of the mixed-motive claim, *see Desert Palace*, 539 U.S. at 99-100, we direct that this summary judgment analysis just described, rather than the *McDonnell Douglas / Burdine* burden-shifting framework, be applied in all Title VII mixed-motive cases regardless of the type of proof presented by the plaintiff.

Our refusal to extend the application of the *McDonnell Douglas / Burdine* framework to our summary judgment analysis of Title VII mixed-motive claims is based upon a careful consideration of the Supreme Court's opinions in those cases. In *Burdine*, the Court explained that the purpose of the "*McDonnell Douglas* division of intermediate evidentiary burdens" is "to bring litigants and the court expeditiously and fairly to [the] ultimate question" of whether the defendant intentionally discriminated against the plaintiff. *Burdine*, 450 U.S. at 253. In single-motive Title VII cases, the *McDonnell Douglas* shifting burdens of production effectively accomplish this task by "smok[ing] out the single, ultimate reason for the adverse employment decision." *Wright*, 455 F.3d at 720 (Moore, J, concurring). In particular, the *prima facie* case requirement "eliminates the most common nondiscriminatory reasons for" the adverse employment action, and thus creates a presumption that the adverse employment action was not motivated by legitimate reasons, but rather by a discriminatory animus. *Burdine*, 450 U.S. at 254. Likewise, the pretext requirement is designed to test whether the defendant's allegedly legitimate

reason was the real motivation for its actions. *Id.* at 256. Such a narrowing of the actual reasons for the adverse employment action is necessary to determine whether there is sufficient evidence to proceed to trial in a single-motive discrimination case because the plaintiff in such a case must prove that the defendant's discriminatory animus, and not some legitimate business concern, was the ultimate reason for the adverse employment action. *See id.*

However, this elimination of possible legitimate reasons for the defendant's action is not needed when assessing whether trial is warranted in the mixed-motive context. In mixed-motive cases, a plaintiff can win simply by showing that the defendant's consideration of a protected characteristic "was *a* motivating factor for any employment practice, *even though other factors also motivated the practice*." 42 U.S.C. § 2000e-2(m) (emphasis added). In order to reach a jury, the plaintiff is not required to eliminate or rebut all the possible legitimate motivations of the defendant as long as the plaintiff can demonstrate that an illegitimate discriminatory animus factored into the defendant's decision to take the adverse employment action. As the shifting burdens of *McDonnell Douglas* and *Burdine* are unnecessary to assist a court in determining whether the plaintiff has produced sufficient evidence to convince a jury of the presence of at least one illegitimate motivation on the part of the defendant, we conclude that the *McDonnell Douglas / Burdine* framework does not apply to our summary judgment analysis of mixed-motive claims. The only question that a court need ask in determining whether the plaintiff is entitled to submit his claim to a jury in such cases is whether the plaintiff has presented "sufficient evidence for a reasonable jury to conclude,

by a preponderance of the evidence, that 'race, color, religion, sex, or national origin was a motivating factor for'" the defendant's adverse employment decision. *Desert Palace,* 539 U.S. at 101 (quoting 42 U.S.C. § 2000e-2(m)).

A Title VII plaintiff may certainly find parts of the *McDonnell Douglas / Burdine* framework to be useful in presenting a mixed-motive claim. As Judge Moore has aptly noted:

> Although the employee need not establish a *McDonnell Douglas* prima facie case to defeat a motion for summary judgment on a mixed-motive claim, setting forth a prima facie case of discrimination under *McDonnell Douglas* can aid the employee in showing that an illegitimate reason motivated the adverse employment decision. [Likewise, in] assessing whether an employee has demonstrated that an illegitimate reason was a motivating factor in the employer's adverse decision, the court should also consider evidence presented by the employer that the protected characteristic was *not* a motivating factor for its employment decision.

Wright, 455 F.3d at 720 (Moore, J., concurring). Nevertheless, we emphasize that compliance with the *McDonnell Douglas / Burdine* shifting burdens of production is *not* required in order to demonstrate that the defendant's adverse employment action was motivated in part by a consideration of the plaintiff's "race, color, religion, sex, or national origin." 42 U.S.C. § 2000e-2(m). The ultimate question for the court in making a summary judgment determination in such a

case is not whether the plaintiff has produced sufficient evidence to survive the *McDonnell Douglas / Burdine* shifting burdens, but rather whether there are any genuine issues of material fact concerning the defendant's motivation for its adverse employment decision, and, if none are present, whether the law – 42 U.S.C. § 2000e-2(m) – supports a judgment in favor of the moving party on the basis of the undisputed facts. *See* Fed. R. Civ. P. 56(c). As "[i]nquiries regarding what actually motivated an employer's decision are very fact intensive," such issues "will generally be difficult to determine at the summary judgment stage" and thus will typically require sending the case to the jury. *Wright*, 455 F.3d at 721 (Moore, J., concurring) (citing *Singfield v. Akron Metro Hous. Auth.*, 389 F.3d 555, 564 (6th Cir. 2004)).

2. Application of the Mixed-Motive Summary Judgment Framework to White's Case

Having determined the appropriate pretrial legal framework to apply to mixed-motive Title VII cases, we now proceed to consider whether Baxter is entitled to summary judgment on White's downgraded performance evaluation claim. To survive Baxter's motion for summary judgment, White must be able to point to evidence in the record on which a jury could reasonably conclude that (1) Baxter's took an adverse employment action against White, for which (2) White's race was a motivating factor. Reviewing the record in the light most favorable to White, we find that White is able to meet this minimal burden of production, and thus that Baxter is not entitled to summary judgment.

a. Adverse Employment Action

As indicated in the above framework, in order to present a claim, either mixed-motive or single-motive, under Title VII, a plaintiff must demonstrate that he has suffered an "adverse employment action." *See White v. Burlington Northern & Santa Fe Ry.*, 364 F.3d 789, 795 (6th Cir. 2004) (en banc), *aff'd in relevant part*, 126 S. Ct. 2405 (2006). An adverse employment action is an action by the employer that "constitutes a significant change in employment status, such as hiring, firing, failing to promote, reassignment with significantly different responsibilities, or a decision causing a significant change in benefits." *Burlington Industries v. Ellerth*, 524 U.S. 742, 761 (1998). In general, "a negative performance evaluation does not constitute an adverse employment action unless the evaluation has an adverse impact on an employee's wages or salary." *Tuttle v. Metropolitan Gov't of Nashville*, 474 F.3d 307, 322 (6th Cir. 2007); *see also Holt v. Morgan*, 79 F. App'x 139, 141 (6th Cir. 2003) (unpublished); *Primes v. Reno*, 190 F.3d 765, 767 (6th Cir. 1999); *Hollins v. Atlantic Co., Inc.*, 188 F.3d 652, 662 (6th Cir. 1999). Thus, to characterize a negative performance evaluation as an adverse employment action "the plaintiff must point to a tangible employment action that she alleges she suffered, or is in jeopardy of suffering, because of the downgraded evaluation." *Morris v. Oldham County Fiscal Court*, 201 F.3d 784, 789 (6th Cir. 2000).

In the instant case, we find that White's allegedly downgraded performance evaluation constitutes an adverse employment action. While the performance evaluation is not nearly as negative as White's characterization of it suggests, we find that there is

sufficient evidence in the record for a jury to reasonably conclude that White has suffered negative employment consequences as a result of the performance evaluation. In particular, the record indicates that by receiving a "Meets Minus" ranking, White did not receive as a high of a pay increase as he would have if he had received the "Meets" evaluation to which he claims he was entitled. Baxter's own 2004 PMO Grid clearly indicates that a TCS with a "Meets Minus" evaluation will receive only a two percent or less pay raise whereas a TCS with a "Meets" evaluation will receive a three percent pay raise. *See* J.A. at 673. Moreover, at his deposition, White testified that he did not receive as high of a pay raise as he should have for the 2004 fiscal year:

> Q: What are the financial consequences if you get a does not meet [on your performance evaluation]?
>
> A: There's no increase [in your salary].
>
> Q: And if you get a meets, what happens?
>
> A: You get an increase.
>
> Q: If you get a meets minus, what happens, do you get an increase?
>
> A: I believe you get less of an increase that you would if it was a meets.
>
> Q: Did you get an increase from 2004 –
>
> A: I did get an increase.

Q: I'm sorry, you did?

A: I did, but not the increase if it would have been a meets outside those extenuating circumstances that affected my territory.

J.A. at 137. Viewing this evidence in the light most favorable to White suggests that, while White did receive an increase in his salary based upon his 2004 job performance, the increase was not as large as it would have been if White had received a better performance evaluation.

We find this evidence sufficient to convince a reasonable jury that White's allegedly downgraded performance evaluation caused him to suffer "a significant change in benefits." *Ellerth*, 524 U.S. at 761. By receiving a lower salary increase than he would have without the more negative evaluation, White was denied an increase in pay to which he allegedly was entitled. Under our precedent, such a deprivation of increased compensation does constitute an adverse employment action. *See Clay*, 501 F.3d at 710 (holding that "deprivation of increased compensation as the result of a failure to train constitutes an adverse employment action"); *Jordan v. City of Cleveland*, 464 F.3d 584, 596 (6th Cir. 2006) ("[D]enial of money would more than amply qualify as a materially adverse action to any reasonable employee for Title VII purposes."); *Nguyen v. City of Cleveland*, 229 F.3d 559, 565 (6th Cir. 2000) (accepting that the denial of the proper pay increase with the plaintiff's promotion constituted an adverse employment action); *see also Fierros v. Texas Dept. of Health*, 274 F.3d 187, 193 (5th Cir. 2001) (finding that denial of a pay increase can constitute an adverse

employment action). Thus, White's evidence does suggest that he has suffered a "tangible employment action" as a result of his downgraded performance evaluation. *Morris*, 201 F.3d at 798. At minimum, White has produced enough evidence to create a genuine issue of material fact regarding whether the downgraded performance evaluation in this case had an "adverse impact" on his receipt of "wages or salary." *Tuttle*, 474 F.3d at 322. Accordingly, we hold that White has produced sufficient evidence for a reasonable jury to conclude that he suffered an adverse employment action in the form of his downgraded 2004 performance evaluation.

b. Race as a Motivating Factor

The second issue we must consider with regard to Baxter's summary judgment motion is whether White has presented evidence from which a jury could reasonably infer that White's race was a motivating factor in the issuance of his downgraded 2004 performance evaluation. As Phillips was the Baxter supervisor responsible for evaluating White's 2004 performance, the question becomes whether there is sufficient evidence for a jury to conclude that Phillips' decision to give White a "Meets Minus" rating was motivated by the fact that White is an African-American. We find that White has satisfied his minimal burden of production on this issue.

At the outset, we note that White has produced sufficient evidence to suggest that Phillips harbors a discriminatory animus toward African-Americans. Indeed, the record reflects that Phillips has made several comments – such as his statement that "nobody wants to be around a black man" – that a jury

could reasonably find to be indicative of racial bias. J.A. at 106. The more difficult question, however, is whether White has produced evidence from which a jury can logically infer that Phillips' racial animus was a motivating factor in his evaluation of White's 2004 job performance. White's evidence in support of such a conclusion stems from his claim that Phillips applied the wrong standard to evaluate his 2004 performance. White argues that he was entitled to have his performance evaluated under the 2004 PMO Grid, as opposed to the criteria in the Gold E-Mail, which Phillips claims he used to evaluate White's performance. White alleges that, while the 2004 PMO Grid was applied across the board to Baxter's other employees, the Gold E-Mail was exclusively applied to him. From Phillips' failure to apply the allegedly correct standard (the 2004 PMO Grid) and his decision to apply a harsher standard (the Gold E-Mail), White argues, a jury can reasonably infer that Phillips was motivated, at least in part, by racial animus when issuing White a "Meets Minus" rating. We agree with White that a jury could draw such an inference from the evidence presented.

White correctly contends that under the terms of the 2004 PMO Grid, which was issued in November of 2004, he was entitled to a "Meets" evaluation. This 2004 PMO Grid specifies that achievement of one hundred percent of the sales target in two of four products, one of which "must be Suprane *or* Brevibloc," equals a "Meets" rating. J.A. at 672 (emphasis added). In 2004, White's year end sales numbers were the following: Suprane, 92%; Brevibloc, 105%; TDS, 101%; and PSA, unknown. Thus, White did achieve over one hundred percent in two of four products, one of them being Brevibloc. Under the plain terms of the 2004

PMO Grid, White should have received a "Meets" evaluation. Accordingly, a jury could reasonably find Phillips' failure to issue such an evaluation suspect, and thus indicative of the presence of an improper motivation – such as racial animus – for the performance evaluation decision.

However, Baxter contends that the 2004 PMO Grid must be read in light of the Gold E-Mail which was circulated to all Regional Managers, including Phillips, on October 22, 2004. The Gold E-Mail emphasized the importance of increasing sales numbers for Suprane and directed that if certain sales representatives, including White, did not "bring their numbers up to a minimum of 95% to plan" by the end of the year then they would "receive a 'DOES NOT MEET' on their PMO, receive a '0' and be placed on a [Performance Improvement Plan]." Evaluated under this standard, as Baxter claims it should be, White's 2004 performance would have merited a "Does Not Meet" rating because White ended the year only ninety-two percent to plan on his Suprane sales.

Nevertheless, in response to Baxter's position, White has introduced evidence which might reasonably convince a jury that the 2004 PMO Grid, and not the Gold E-Mail, was the standard Phillips was supposed to use to evaluate the performance of Baxter sales representatives. First, White points to the testimony of Kunz, who explained that the PMO Grid "matrix" is used to "produce a rating" for a sales representative's performance evaluation.[11] J.A. at 603.

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[11] The full context of the above-quoted language from Kunz's deposition is much more illustrative of the role the PMO Grid

Next, White emphasizes that the 2004 PMO Grid was created after the Gold E-Mail and thus should be viewed as controlling. Finally, White provides examples of other Baxter employees whose performance appears to have been evaluated pursuant to the 2004 PMO Grid.

In particular, White points to the performance evaluations of Linda Assoey, Stacey Hord, Peter Moe, Theodore Quinn, Carey Redd, Lawrence Rome, and Melissa Slyvester, who were all supervised by regional managers other than Phillips.[12] Like White, each of

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serves in performance evaluations:

> Q: I guess one thing I'm trying to determine is, does there ever come a time within these PMOs or otherwise where you set a hard and fast number, for instance, if sales representative Y doesn't achieve X percent of budget in a given product, that sales representative is going to receive a meets minus for a given year?
>
> A: Yes. As I said, what we do is put together basically a matrix or a guideline that includes all products based upon their specific goals and their rating and then specific territory would fall somewhere within that and as a result, *it would produce a rating*.

J.A. at 603 (emphasis added). Viewed in the light most favorable to White, this colloquy does suggest that the PMO Grid serves as the basis for a Baxter employee's performance rating.

[12] White also directs our attention to the performance evaluations of Stephen Morris ("Morris") and Theresa Thomas ("Thomas"), who, like White, were supervised by Phillips. Both Morris and Thomas received "Meets" evaluations for 2004. As White correctly notes, these evaluations were consistent with the 2004 PMO Grid because both Morris and Thomas had achieved over one hundred

these sales representatives achieved less than ninety-five percent of their Suprane goal. However, rather than being given a "Does Not Meet" rating for failing to achieve more than ninety-five percent of their Suprane goal, as would be required under the terms of the Gold E-Mail, these sales representatives received "Meets Minus" ratings. White correctly observes that, in each case, the "Meet Minus" rating given was consistent with the 2004 PMO Grid.[13] Such evidence

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percent in two of the four product categories. However, unlike White, Morris and Thomas each achieved over one hundred percent for Suprane, with their other one hundred percent category being TDS. Thus, while the "Meets" ratings given to Morris and Thomas are consistent with an evaluation of their performance under the 2004 PMO Grid, these ratings are also consistent with an evaluation of their performance under the Gold E-Mail. Accordingly, we agree with Baxter, that Morris' and Thomas' evaluations do not necessarily imply that the 2004 PMO Grid, as opposed to the Gold E-Mail, was the standard actually used to evaluate other Baxter employees' performance.

[13] White also contends that the fact that he was given a "Meets Minus" rating as opposed to the "Does Not Meet" rating that would have been dictated by the Gold E-Mail further undermines Baxter's claim that the Gold E-Mail contained the standard which Baxter Regional Managers were supposed to apply. We are unpersuaded by this argument. A careful reading of Phillips' actual evaluation of White demonstrates that Phillips was applying the standard enunciated in the Gold E-Mail, but that he chose to depart upward from it. *See* J.A. at 670 ("Based on Todd's quantitative results, Todd has achieved a rating of 'Does Not Meet'. However, due to Todd"s [sic] diligence and commitment to the business that has been demonstrated by his focus on Suprane and his consistent work in the Region, I have moved this rating to a Meets(-).") Accordingly, we do not find that White's performance evaluation alone would convince a reasonable jury that the Gold E-Mail was not the standard actually being applied to evaluate Baxter sales representatives' performance.

reasonably suggests that the 2004 PMO Grid, rather than the Gold E-Mail, was the standard actually applied for these performance evaluations.

Considering all of this evidence in the light most favorable to White, as we must, we find that there is a genuine issue of fact concerning which standard – the 2004 PMO Grid or the Gold E-Mail – Phillips should have used to evaluate White's 2004 performance. If the jury were to conclude, as it reasonably could based on the evidence presented, that the 2004 PMO Grid was the appropriate standard, then it could legitimately infer from Phillips' failure to apply this correct standard that an impermissible factor – namely White's race – served as at least a partial motivation for his decision to issue White a "Meets Minus" performance evaluation. Thus, we find this disputed issue of fact to be material, and we hold that Baxter is not entitled to summary judgment on White's downgraded performance evaluation claim.

Because White has produced sufficient evidence for a reasonable jury to conclude in his favor on both his single-motive and mixed-motive race discrimination claims, we find that he is entitled to present these claims to a jury and accordingly remand the case to the district court for trial. As the issue of what damages White may be entitled to should he prevail on his claims at trial has not been briefed by the parties and is not presented in this summary judgment challenge, we express no view with regard to it.[14]

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[14] We find Judge Gilman's gratuitous discussion about how Baxter may seek to limit White's remedies in this case to be of questionable propriety. *See* Dissenting Op. at 25-26. Without

IV. CONCLUSION

For the foregoing reasons, the judgment of the district court is **REVERSED,** and the case is remanded to the district court with instructions to permit White to present his race discrimination claims to a jury.

CONCURRING IN PART AND DISSENTING IN PART

RONALD LEE GILMAN, Circuit Judge, concurring in part and dissenting in part. I concur in the majority's conclusion that White has produced sufficient evidence to survive summary judgment on his performance-review claim and I agree with the majority's articulation of the appropriate standard for evaluating Title VII mixed-motive claims that are raised under 42 U.S.C. § 2000(e)-2(m). But I respectfully disagree with the majority opinion to the extent that it permits White's failure-to-promote claim to proceed to trial. In particular, I do not believe that White has raised a genuine issue of material fact as to whether Baxter's proffered reasons for promoting Freed instead of White were pretextual. I will first explain why I reach this conclusion with respect to White's failure-to-promote claim, and will then proceed

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knowing all of the evidence that will be presented by the parties at trial, or how the case will unfold going forward, no judge, on either this Court or the district court, is in a position to opine as to the merits of Baxter's potential affirmative defense or the likely relief available to White should he prevail on his claims. Moreover, the parties' attorneys in this case are not lacking in talent and certainly do not need supererogatory instructions from this Court as to how to best serve their clients on remand.

to make several comments about the mixed-motive claim.

A. Failure-to-promote claim

The majority acknowledges, and I agree, that (1) White established a prima facie case of race discrimination on his failure-to-promote claim, and (2) Baxter's proffered reason for failing to promote White (i.e., that Freed was more qualified and better suited to the position) is "facially legitimate and non-discriminatory." Maj. Op. at 8-9. I disagree, however, with the majority's conclusion that White sustained his burden of "produc[ing] sufficient evidence from which the jury may reasonably reject" Baxter's explanation for promoting Freed instead of White. *See Manzer v. Diamond Shamrock Chems. Co.*, 29 F.3d 1078, 1083 (6th Cir. 1994).

To carry his burden of demonstrating that Baxter's proffered explanation for promoting Freed was merely a pretext designed to mask discrimination, White must show that this "nondiscriminatory reason: (1) had no basis in fact, (2) did not actually motivate defendant's conduct, or (3) was insufficient to warrant the challenged conduct." *Zambetti v. Cuyahoga Cmty. Coll.*, 314 F.3d 249, 258 (6th Cir. 2002). White insists that the district court erred in determining that he had not produced sufficient evidence to permit a jury to find that Baxter's justification for promoting Freed was pretextual. He claims that Baxter's proffered reason must be pretextual because "he was easily the most qualified candidate for the management position and should have received the position." In the alternative, he contends that, at a minimum, the question of pretext should be submitted to a jury. He

makes three specific arguments in support of his position: (1) that Freed had never actually sold Baxter's proprietary products, while White had seven years of sales experience and a "sterling sales record," (2) that Baxter overstated Freed's management experience because during her interview she described an incident in which she "admittedly feared confronting" a subordinate employee about his chronic tardiness, and (3) that White was the only candidate who had a master's degree.

In response to White's first argument, uncontroverted evidence in the record shows that although Freed did not have experience selling Baxter's proprietary products, she did have extensive prior experience selling proprietary pharmaceuticals for other companies. Freed also attended all of the training classes on Baxter's proprietary products, designed and implemented sales-training programs, and taught new sale representatives about the proprietary products. These undisputed facts, combined with evidence in the record that Freed actually discussed ideas for improving sales in the relevant region during her interview for the position, casts considerable doubt on the majority's unsupported statement that she, "in all likelihood, was less familiar than was White with the specific challenges faced by the ACCO division in promoting Baxter's products." Maj. Op. at 11.

The majority also states that White's master's degree and prior management experience could lead a jury to conclude that Baxter's legitimate nondiscriminatory reason for promoting Freed instead of White was pretextual. Maj. Op. at 10. To the contrary, I do not believe that the evidence on which

White and the majority rely in support of this conclusion creates a genuine issue of material fact as to whether Baxter's assertion that Freed was better qualified for the Regional Manager position "has no basis in fact, did not actually motivate Baxter's decision, or is not sufficient to explain its hiring choice." Maj. Op. at 11.

The recognition that White had more experience selling Baxter's products and has a master's degree in business management does not necessarily show either that Freed was less qualified than White or that Baxter's decision was not actually based on a reasonable determination of the candidates' relative qualifications. Baxter in fact put forth an abundance of evidence showing not only that Freed was well qualified for the position, but also that the three interviewers unanimously believed that she better displayed the qualities of a good manager. The interviewers specifically testified that they had considered Freed's lack of experience in selling Baxter's products, but believed that this deficit was outweighed by her general sales background, her participation in numerous training classes, and her experience in teaching sales representatives about the products.

White's contention that he was more qualified than the other candidates because he has a master's degree is likewise unpersuasive, particularly in light of the interviewers' testimony that they found White's personality to be off-putting and incompatible with the type of interactions that a manager would be required to have with sales representatives. Although the majority is surely correct that "any evaluation of White's interview performance is an inherently

subjective determination," Maj. Op. at 10, such determinations are also inevitably a part of the hiring and promotion decisions that employers must make in the course of business. To the extent that these subjective determinations may be "easily susceptible to manipulation in order to mask the interviewer's true reasons for making the promotion decision," *id.*, such a concern has no place in the present case, where White himself concedes that he has no reason to believe that any of the interviewers held any discriminatory animus against African-Americans. This concession is all the more significant considering the uncontroverted fact that each interviewer rated Freed first and White last among the five candidates interviewed for the managerial position.

The assertion by White that the interviewers could not have believed that Freed was qualified because she admitted that she had once been nervous about confronting a subordinate is simply without merit. Not only does such evidence fail to demonstrate that Freed was unqualified for the management position (especially given that Freed went on to explain that she had effectively dealt with the employee in question), but the anecdote does nothing to undermine Baxter's argument that the interviewers acted reasonably in concluding that Freed had substantially more management experience than White.

In short, I do not believe that White has produced any evidence showing that Baxter's choice of Freed over White was anything other than a "reasonably informed and considered" business decision. *See Smith v. Chrysler Corp.*, 155 F.3d 799, 807 (6th Cir. 1998). I am also troubled by the majority's conclusion that "White's arguably superior qualifications . . . , in and

of itself, could lead a jury to doubt the justifications given for Baxter's hiring decision." Maj. Op. at 10. Such a holding ignores this court's decision in *Smith* and goes a long way towards completely eviscerating the business-judgment rule articulated in that case and reaffirmed in *Wexler v. White's Fine Furniture, Inc.*, 317 F.3d 564, 576-77 (6th Cir. 2003) (en banc). This court in *Smith* explained that "the key inquiry" in determining whether an employer's proffered good-faith business decision should be given credence is "whether the employer made a reasonably informed and considered decision before taking an adverse employment action." 155 F.3d at 807; *see also Tex. Dep't of Cmty. Affairs v. Burdine*, 450 U.S. 248, 256 (1981) (permitting an employee to establish pretext "by showing that the employer's proferred explanation is unworthy of credence").

Contrary to the majority's mischaracterization of my analysis, I do not think for a minute that we should "unquestionably accept the employer's own self-serving claim that the decision resulted from an exercise of 'reasonable business judgment.'" Maj. Op. at 9 n.6. Rather, the test articulated in *Smith* requires an independent evaluation of whether the employer's determination was in fact reasonable. *See Wexler*, 317 F.3d at 577 (concluding that genuine issues of material fact precluded a finding that the employer's proffered reason for demoting Wexler was reasonable). But our independent evaluation of the reasonableness of an employer's business judgment does not preclude us from *ever* finding that an employer's proffered justification is reasonable as a matter of law. *See Smith*, 155 F.3d at 808-09 (affirming the grant of summary judgment in favor of the employer where the employee was unable to raise a genuine issue of

material fact to dispute the employer's reasonable reliance on the facts before it when making the decision to terminate the employee).

In the present case, the fact that White has adduced evidence showing that he and Freed were both qualified for the Regional Manager position does not create a genuine issue of material fact as to whether Baxter's decision to promote Freed instead of White was unreasonable or ill-informed. *See Vredevelt v. GEO Group, Inc.*, 145 F. App'x 122, 131 (6th Cir. 2005) (noting that the plaintiff's allegation that she was more qualified than the male candidate the company hired was unpersuasive because "[a]t best, the comparison in this case is between two qualified employees").

I also believe that the majority's reliance on *Wexler* is misplaced in light of the factual distinctions between that case and the one before us. In *Wexler*, the employer claimed that Wexler's demotion was based on the store's declining sales under his management. 317 F.3d at 576. This court concluded that application of the business-judgment rule was inappropriate in that case because genuine issues of material fact existed as to the reasonableness of the employer's decision to fault Wexler for the company's declining sales. In particular, this court noted that (1) the company was aware that factors beyond Wexler's control were contributing to the declining revenue, (2) the supervisors who made the decision to demote Wexler had made adverse age-related statements about him, and (3) the company retained one of the employees who eventually replaced Wexler as store manager despite the fact that sales continued to decline under that employee's management. *Id.* at 577.

The recognition by *Wexler* that courts may consider "the reasonableness of an employer's decision" at the pretext stage "to the extent that such an inquiry sheds light on whether the employer's proffered reason for the employment action was its actual motivation," *id.* at 576, is of no help to White in the present case. Here the record clearly shows that the choice of Freed over White was based on a reasonable business judgment that Freed was the most qualified of the five candidates for the Regional Manager position. *See Smith*, 155 F.3d at 807 (permitting employers to make business judgments where those decisions are "reasonably informed and considered").

I believe, in sum, that this court's precedents require more recognition of such business judgments than the majority's decision permits, and that White failed to produce sufficient evidence for a jury to conclude that Baxter's proffered reasons for hiring Freed over White were pretextual. For these reasons, I would affirm the district court's grant of summary judgment as to White's failure-to-promote claim. I therefore respectfully dissent from the majority's resolution of this issue.

B. White's downgraded-performance-evaluation claim and the proper summary-judgment framework for mixed-motive claims

Although I agree with the majority's persuasive and well-reasoned discussion of the appropriate framework for evaluating mixed-motive claims at the summary-judgment stage and concur in the result reached in that portion of the majority opinion, I write separately to comment on the likely effect of the new framework and its application to the specific

circumstances of the case before us. In particular, I am wary of the majority's statement that the standard we announce today "will typically require sending the case to the jury." Maj. Op. at 16. In my view, the standard laid out in the majority opinion must be applied with a view towards the more general principle that summary judgment serves an important screening function in our judicial system. *See Crawford-El v. Britton*, 523 U.S. 574, 600 (1998) ("[S]ummary judgment serves as the ultimate screen to weed out truly insubstantial lawsuits prior to trial."). District courts reviewing motions for summary judgment on a mixed-motive claim, therefore, must always undertake that analysis with Rule 56 of the Federal Rules of Civil Procedure in mind, which directs courts to grant such a motion where "there is no genuine issue as to any material fact and . . . the movant is entitled to judgment as a matter of law." Contrary to the majority's suggestion, I believe that the articulated standard leaves ample room for courts to determine that no reasonable jury could conclude that a protected characteristic was a motivating factor in an adverse employment decision.

I also believe that the evidence favoring White in this case is quite weak and just barely passes muster under the new standard that we have articulated. Indeed, the key evidence in the record that supports White's performance-review claim is the collection of remarks allegedly made by Phillips, which—as the district court properly found—seem to evince a racially discriminatory animus. Those alleged remarks, combined with the factual dispute over which criteria should have governed the evaluation of White's performance (the Gold email or the 2004 PMO grid), could lead a jury to infer that race was at least a

motivating factor when Phillips chose to partially follow the more stringent requirements of the Gold email.

That inference is not dispelled by any showing in the record that Phillips applied the Gold email to any nonprotected employees, which would render unreasonable the conclusion that Phillips was motivated by race in determining how to properly evaluate White's performance. *See* Maj. Op. at 16 (noting that "the court should also consider evidence presented by the employer that the protected characteristic was *not* a motivating factor for its employment decision" (quoting *Wright v. Murray Guard, Inc.*, 455 F.3d 702, 720 (6th Cir. 2006) (Moore, J., concurring)). Nevertheless, in the absence of Phillips's alleged racist remarks, I would have concluded that there was no basis for a jury to find that race was "a motivating factor" in the downgraded performance review received by White.

White's claim would certainly fail under the more stringent *McDonnell Douglas* framework used to evaluate claims brought under Title VII's general antidiscrimination provision, 42 U.S.C. § 2000e-2(a)(1), if for no other reason than that he has failed to show that any similarly situated employee was treated more favorably than he was with respect to performance evaluations. So although I concur in the majority's explanation of why this type of evidence should not be required to survive summary judgment on a mixed-motive claim, there is no question that White would have a much stronger case to present to a jury if there was such evidence in the record. I therefore find myself barely persuaded that a genuine issue of material fact exists as to whether race was a motivating factor in

White's performance review, but I would not be at all surprised if a jury ultimately finds to the contrary.

Finally, I would note that the remedy-limitation provision contained in 42 U.S.C. § 2000e-5(g)(2)(B) may prove to be particularly important in the instant case. That provision provides an employer with a "limited affirmative defense that does not absolve it of liability, but restricts the remedies available to a plaintiff. The available remedies include only declaratory relief, certain types of injunctive relief, and attorney's fees and costs." *Desert Palace, Inc. v. Costa*, 539 U.S. 90, 94 (2003). In the present case, Baxter may well be able to show that White would have received a downgraded performance review even in the absence of the impermissible consideration of race, in which case it could successfully assert the § 2000e-5(g)(2)(B) affirmative defense. *See* § 2000e-5(g)(2)(B) (explaining that the limitation-of-remedies provision applies where "an individual proves a violation under section 2000e-2(m) of this title and a respondent demonstrates that the respondent would have taken the same action in the absence of the impermissible motivating factor").

The evidence in the record relating to the Gold email and White's failure to meet his Suprane sales goals will be highly relevant to this showing. Moreover, the jury could easily conclude that Phillips "split the difference" between the criteria contained in the 2004 PMO Grid and the Gold email, giving White a *more* favorable review than he would have received upon a straightforward application of the criteria set forth in the Gold email. If Baxter chooses to proceed in this way and the jury finds that the company would have downgraded White's performance review even in the absence of any impermissible consideration of

White's race, then the remedies available to White will be considerably limited. He would under such circumstances be entitled to declaratory and perhaps limited injunctive relief, and to "attorney's fees and costs demonstrated to be directly attributable only to the pursuit of" the mixed-motive claim. *See* § 2000e-5(g)(2)(B)(i). If this is indeed the ultimate outcome, then the district court would be unable to "award damages or issue an order requiring any admission, reinstatement, hiring, promotion, or payment." § 2000e-5(g)(2)(B)(ii). Section 2000e-5(g)(2)(B) thus provides an important counterbalance to the relatively lenient summary-judgment standard that we announce today, and may be particularly applicable in the present case.

APPENDIX B

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

No. 05-71201

[Filed April 16, 2007]

TODD A. WHITE,	)
	)
Plaintiff,	)
	)
v.	)
	)
BAXTER HEALTHCARE CORPORATION,	)
	)
Defendant.	)
	)

OPINION AND ORDER

Todd White, an African-American male, brought a five-count complaint against his employer, Baxter Healthcare Corporation. Plaintiff alleged race and gender discrimination, violating (1) Title VII, (2) the Elliott-Larsen Act (MCL § 37.2101), and (3) the Civil Rights Act of 1866. This matter is before this Court on the Magistrate Judge's Report and Recommendation regarding Defendant's motion for summary judgment. Plaintiff timely filed two objections to the Report and Recommendation. The first objection states the

Magistrate Judge erred by concluding that "there remains no genuine issue of fact regarding Plaintiff's claim of race discrimination regarding his 2004 performance review." Plaintiff argues the Magistrate Judge erroneously found that (1) the Plaintiff did not meet his employer's legitimate expectations and (2) that the evidence did not indicate that a similarly situated non-African-American was treated differently during the 2004 performance review. Plaintiff's second objection argued that the Magistrate Judge erred in concluding the Defendant's reasons for not promoting him were not pretextual. Accordingly, I have conducted *de novo* review of the record in light of the specific objections of the parties, see Fed. R. Civ. P. 72(b); Vogel v. U.S. Office Prods. Co., 258 F.3d 509, 515 (6th Cir. 2001), and conclude for the reasons stated by the Magistrate Judge that Plaintiff's objections should be DENIED and Defendant's motion for summary judgment should be GRANTED.

I. Plaintiff Did Not Meet His Employer's Legitimate Expectations.

I ADOPT in full the Magistrate Judge's Report and Recommendation regarding Plaintiff's first objection without further comment.

II. The Evidence Did Not Indicate That Similarly Situated non-African-Americans were Treated Differently During the 2004 Performance Review.

Plaintiff's second objection is that the Magistrate Judge erred in concluding that Plaintiff had not provided sufficient evidence to support his argument that Defendant's purported non-discriminatory

reasons for failing to promote Plaintiff were pretextual. Plaintiff suggests that race and/or sex discrimination played into Defendant's decision to not to hire him for a regional manager position in 2004.

Defendant's reason for not hiring Plaintiff for this position is not pretextual. The record suggests that Defendant made a business decision in hiring Maggie Freed because Defendant valued her previous management experience, her experience in pharmaceutical sales, and her interview. Plaintiff cannot establish pretext unless the business decision is so "ridden with error that defendant could not honestly have relied upon it." Lewis v. Sears, Roebuck & Co., 845 F.2d 624, 633 (6th Cir. 1988); see Smith v. Chrysler Corp., 155 F.3d 799, 807 (6th Cir. 1998); Wexler v. White's Fine Furniture, Inc., 317 F.3d 564, 676-577 (6th Cir. 2003) (for purposes of Title VII, absolute deference to business judgment is not required; the reasonableness of the employer's decision is considered only if the inquiry sheds light on whether the employer's proffered reason for the employment action was its actual motivation). I find nothing in the record to suggest that defendant's decision to hire Freed was ridden with error. Instead, Plaintiff merely attempts to persuade this Court to retry whether Freed is more qualified than Plaintiff for the managerial position which it will not do. (Plaintiff Objections at 13.) What Plaintiff does not do is provide credible evidence, direct or circumstantial, that Defendant's proffered reason was not its actual motivation for denying Plaintiff the regional manager position. Thus, this Court ADOPTS the Magistrate Judge's Report and Recommendation regarding the second objection.

III. Conclusion

Defendant's motion for summary judgment is GRANTED and this case is DISMISSED with prejudice. **IT IS SO ORDERED.**

Date: April 16, 2007

s/John Feikens
United States District Judge

APPENDIX C

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

No. 05-71201

[Filed February 8, 2007]

TODD A. WHITE,	)
	)
Plaintiff,	)
	)
vs.	)
	)
BAXTER HEALTHCARE CORPORATION,	)
	)
Defendant.	)
	)

HONORABLE JOHN FEIKENS
HONORABLE STEVEN D. PEPE

REPORT AND RECOMMENDATION

On March 28, 2005, Plaintiff, an African-American male (Complaint, ¶ 10), filed his complaint alleging race discrimination pursuant to 42 U.S.C. §1981 (§1981), 42 U.S.C. 2000e, et seq. (Title VII) and Michigan's Elliot-Larsen Civil Rights Act, M.C.L. 37.2101 (Elliot-Larsen) and gender discrimination

pursuant to Title VII and Elliot-Larsen against his employer, Defendant Baxter HealthCare Corporation.

Defendant filed its motion for summary judgment on March 31, 2006 (Dkt. # 7), which was referred to the undersigned on June 5, 2006.

For the reasons stated below, IT IS RECOMMENDED that Defendant's motion be GRANTED.

I. STANDARD OF REVIEW

Summary judgment is appropriate only when there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(c). Rule 56(c) mandates summary judgment against a party who, after adequate time for discovery,[1] fails to establish the existence of an element essential to that party's case and on which that party bears the burden of proof at trial. *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986).

The moving party has the initial burden of showing "the absence of a genuine issue of material fact." *Id.*, at 323, 106 S.Ct. at 2553. Once the movant meets this burden, the non-movant must come forward with specific facts showing that there is a genuine issue for trial. *Matsushita Electric Industrial Co., Ltd. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986). To demonstrate a genuine issue, the non-movant must present

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[1] While there is not a scheduling order mandating discovery cut-off in this matter, Plaintiff filed the complaint more than one year before Defendant's motion for summary disposition. further, none of Plaintiff's arguments in opposition to Defendant's motion pertain to a need for further discovery.

sufficient evidence upon which a jury could reasonably find for the non-movant. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 252 (1986). "If the evidence is merely colorable, or is not significantly probative, summary judgment may be granted." *Id.*, at 249-50, 106 S.Ct. at 2511.

Rule 56(e) provides that "[w]hen a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of his pleadings, but his response, *by affidavits or as otherwise provided in this rule*, must set forth specific facts showing that there is a genuine issue for trial. If he does not so respond, summary judgment, *if appropriate*, shall be entered against him." Fed. R. Civ. P. 56(e) (emphasis supplied).

II. FACTS[2]

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[2] In his complaint Plaintiff alleged both gender and race discrimination pursuant to §1981, Title VII and Elliot-Larsen and specifically pled allegations to support a racially hostile work environment claim and what appeared to be multiple instances of disparate treatment based on race. In his response to Defendant's motion for summary judgment Plaintiff offered no argument and provided no Fed. R. Civ. P. 56 (Rule 56) compliant evidence to support several of the claims originally pled in his complaint. In fact, Plaintiff seemed to narrow the focus of his claims to race discrimination under Title VII and Elliot-Larsen based upon Defendant's failure to promote him to Regional Manager and race discrimination under Title VII and Elliot-Larsen based upon disparate treatment received in Phillip's review of Plaintiff's 2004 performance.

The facts recited in this section are only those allowed to be considered by Fed. R. Civ. P. 56(e), i.e. those contained in depositions, answers to interrogatories and admissions on file;

Defendant Baxter Healthcare Corporation, is a wholly-owned, U.S.-based subsidiary of Baxter International, Inc. Baxter International produces and sells medical technologies related to the blood and circulatory system.

Among Defendant's business groups is ACCO, which stands for Anesthesia, Critical Care, and Oncology (Exhibit A, White Dep., pp. 154-55)[3]. Defendant purchased Plaintiff's employer, Ohmeda, in April 1998, and merged it into ACCO (Exhibit A, White Dep., pp. 14-15).

Plaintiff's duties both at Ohmeda and at Baxter consisted of selling proprietary and generic products to anesthesia professionals (Exhibit A, White Dep., p. 14). As a sales representative, Plaintiff is supervised by a Regional Manager. Regional Managers, in turn, report to an Area Vice President (Exhibit A, White Dep., pp. 154-55).

When Plaintiff became employed by Baxter, he was supervised by Richard Clark, the same Regional Manager to whom he reported at Ohmeda (Exhibit A, White Dep., pp. 14-15). In 1999 and 2000, Plaintiff was supervised by Regional Manager Richard Burns (Exhibit A, White Dep., p. 16). In 2001, Plaintiff moved into a position titled Teaching Center Specialist in which he sold products to anesthesia professionals at larger hospitals that ran teaching programs. A

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supporting affidavits and undisputed facts contained in the pleadings. *Smith v. Hudson*, *supra*, 600 F.2d at 64-65.

[3] Unless otherwise noted, the exhibits referred to are those attached to Defendant's motion for summary judgment.

Teaching Center Specialist (TCS) is dedicated to residency programs for doctors and nurses in anesthesia programs. They are responsible for sales as any other sales representative, but are held to a higher standard of product knowledge and teaching skills (Exhibit A, White Dep., pp. 16-18; Exhibit C, Kunz Dep., pp. 32-33).

As a TCS, Plaintiff was supervised again by Richard Clark, and continued to report to Clark until January 1, 2004. Plaintiff testified that he has no reason to think that Clark has any discriminatory animus against blacks or men (Exhibit A, White Dep., pp. 16-20).

From January 1, 2004, to the present, Plaintiff has reported to Regional Manager of Northern Teaching Center Specialists, Tim Phillips. Phillips supervises six to seven Teaching Center Specialists. Plaintiff testified that he has no reason to think that Phillips has any discriminatory animus against men (Exhibit A, White Dep., pp. 18, 20; Exhibit B, Phillips Dep., pp. 6-7).

Throughout his employment with Baxter, Plaintiff has been recognized for his strong sales performance. In addition to being elevated to the Teaching Center Specialist position, Plaintiff received an award for the Distinguished Sales Club for 2000 for being in the top five percent of sales representatives, a Sales Achievement Award for 2003, and was rated as exceeding expectations for 2000 and 2003, and as meeting expectations for 2001 and 2002 (Exhibit D, Clark Dep., pp. 24, 71-72, 99-105, 113 and Clark Dep. Exs. 1, 8, 18, 19, 20, 21).

In September 2004, Plaintiff applied for a Regional Manager position. This was the first Regional Manager position for which Plaintiff had applied (Exhibit A, White Dep., pp. 154-58). There were no and had never been any African Americans in the role of Region Manager or in a higher position within the division (Defendant's Answer, ¶27). Plaintiff alleges that Defendant's failure to promote him to this position constitutes race discrimination in violation of Title VII and Elliot-Larsen (Dkt. #10, p. 35).

Carl Gold, ACCO Area Vice President for Sales for the eastern half of the United States since the fall of 2003, was the ultimate decision-maker in determining who would be selected for the position. Gold asked Human Resources Director Daryl Martin and ACCO Area Vice President for the western half of the United States Carl Kunz to interview all candidates for the position with him, and to be a part of the hiring process (Exhibit E, Martin Dep., pp. 99-100; Exhibit F, Gold Dep., pp. 27). Tim Phillips, Plaintiff's supervisor, was not formerly involved in the Regional Manager selection process (Exhibit B, Phillips Dep., p. 98-100; Exhibit A, Plaintiff Dep., p. 182.), although Phillips testified that he told Gold before the interview that Plaintiff would be a good fit for the position (Exhibit B, Phillips Dep., p. 98-100) and Carl Gold testified that Phillips had discussed Plaintiff with him and Plaintiff "never came out in OTR process[4] . . . as being a high performer . . . as being somebody that was ready to move into a regional manager role (Plaintiff's Response, Exhibit 21, Phillips Dep., p. 63-64). Gold

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[4] "OTR" stands for Organized Talent Review and is described more fully in footnote 7 below.

also stated that from "managers' comments" he gleaned that Plaintiff was "not referred to as a team player. He talked a lot about I, me . . . my way or the highway" (*Id.*).

Plaintiff testified that he has no basis on which to believe that Gold, Martin, or Kunz has any discriminatory animus toward blacks or men (Exhibit A, Plaintiff Dep., pp. 20-21).

Gold, Martin, and Kunz considered five candidates: Plaintiff, Maggie Freed, Brett Corrick, Stacy Hord, and Carey Redd. All but Plaintiff are Caucasian and all but Freed are men (Exhibit C, Kunz Dep., p.79 and Kunz Dep. Ex. 2).

All five candidates submitted resumes and participated in interviews of about one hour each with each of the three interviewers (Exhibit A, Plaintiff Dep., pp. 162-63; Exhibit C, Kunz Dep., p. 178; Exhibit F, Gold Dep., p. 89).

After the interviews, Gold, Martin, and Kunz each arrived at their own rankings of the candidates. All rated Maggie Freed as the top candidate. Gold rated Stacy Hord as the second best, and Brett Corrick as the third best, while Martin and Kunz each rated Corrick as number two and Hord as number three. All three rated Carey Redd as the fourth best candidate. Gold, Martin, and Kunz all rated Plaintiff last among the five candidates (Exhibit C, Kunz Dep., pp. 99-101 and Kunz Dep. Exs. 3, 5, 7, 9, 10 (containing resumes and Kunz's notes and grades of all five candidates); Exhibit E, Martin Dep., pp. 148-49, 154; Exhibit F, Gold Dep., pp, 81, 97-98).

Defendant provided the following as reasons Freed was ranked as the top candidate by the three interviewers:

- Freed was well-prepared for the interview with specific objectives for turning around the region, was enthusiastic and demonstrated confidence and a high energy level during her interview (Exhibit C, Kunz Dep., pp. 142, 145; Exhibit F, Gold Dep., pp. 92, 93) and basically had an excellent performance in the interview (E, Martin Dep., p 125).

- Freed had experience hiring, training and managing people (Exhibit C, Kunz Dep., pp. 139, 147). In the position she held before being selected as Regional Manager, Freed managed two direct reports, was responsible for hiring and training a group of 14-16 national field trainers for the "pharmaceutical side, the device side then eventually the multi-source pharmacuetical side" (Exhibit G, Freed Dep., pp. 27). She also developed and implemented the training programs[5] (*Id.* at p. 28).

- Freed won sales trips three times during her employment with Baxter (Exhibit G, Freed Dep., p. 63).

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[5] Plaintiff alleges that Ms. Freed testified about a management situation in which she had felt intimidated, but did not attach the portion of her deposition in which she is alleged to have so stated (Dkt. #10, p. 25-26).

- In her performance reviews Freed was rated as exceeds expectations for 2000, 2001 and 2002, and was regarded as too new to review in her new position for 2003 (Exhibit G, Freed Dep., pp. 57, 63, 64, 74-75 and Freed Dep. Exs. 3, 4, 5, 7).

- The interviewers initial concerns regarding Freed's level of product knowledge (she sold devices and not proprietary pharmaceuticals for Baxter) were addressed because she had a sales background and lots of sales experience (she sold proprietary pharmaceuticals while employed by Lederle Laboratories, devices for IMed, and devices for Baxter for several years) she had attended all training classes on the proprietary products, she designed training programs and taught the new sales representatives about the products and had facilitated classes on the products (Exhibit C, Kunz Dep., pp. 139, 143 & Ex. 9; Gold Dep., p. 137; Exhibit G, Freed Dep., pp. 8-11, 27- 29, 31, 57, 63, 64, 74-75).

Defendant provides the following reasons all three interviewers rated Plaintiff as the fifth out of five:

- In the opinion of Interviewer Martin, Plaintiff was talking "at her" as opposed to "to her," did not demonstrate a sense of strength in coaching others as did Freed, and was overly aggressive in the interview.

(Exhibit E, Martin Dep., pp. 130, 147).

- In the opinion of Gold, Plaintiff was "in your face aggressive" and came off as too confrontational and "in your face" to effectively ride with and coach a sales representative. He asked Gold questions that caused him to be concerned about the type of questions he would ask a sales representative. Gold further said that, "Instead of sticking to the facts about what he brought to the party or what he would do if he took the position and being specific about that, he asked me what I have done to promote cultural diversity within Baxter ACC. I'd rather hear about his plan of action, where he thought the business was going, what he'd do in the region to change things."

  Gold felt Plaintiff overused the word "I," and commented that "If he approached the interview in the way he did and replicated that with reps, it would be a disaster. Todd got right in my face. My feedback to him was that he needs an interviewing class. He needed to talk about things other than himself or 40,000 foot issues that you could spend three days talking. Did he want to talk about turning this region around, or about cultural diversity?"

(Exhibit F, Gold Dep., pp. 83-88).

- In the opinion of Kunz, the interview with Plaintiff was "difficult," "uncomfortable," and "tense." Plaintiff was forceful and assertive, but sometimes crossing over into aggressive and agitated. Kunz found it difficult to ask Plaintiff questions because Plaintiff wanted to present to him. Further, Plaintiff would use phrases that

> Kunz had difficulty understanding. When Kunz asked Plaintiff how he would turn the region around, Plaintiff responded on how the sales reports were incorrect. When Kunz then tried to steer Plaintiff to focus on the people, and not the reports, Plaintiff presented him what Kunz regarded as faulty logic. Kunz also perceived that Plaintiff gave broad answers to questions such as "I will set consistent standards," or "I will build a coalition," and that when Kunz asked Plaintiff what he meant by those broad statements, Plaintiff would become defensive and condescending by repeatedly using Kunz's name and say things such as "I really want to be perfectly clear on this point, do you get it? do you understand it?" Kunz also believed that Plaintiff came across as having an overly directive "my-way-or-the-highway" management style as in "we're not going to have a negotiation here" or "we're not going to have a conversation." Moreover, Kunz believed that while Plaintiff had a proven sales record and good team member, he had shallow experience in managing people.

(Exhibit C, Kunz Dep., pp. 154-66 and Kunz Dep. Ex. 10).

Defendant argues that, based on the consensus of all three interviewers, Gold decided to select Freed as the Regional Manager for the Chicago region (Exhibit C, Kunz Dep., p. 70; Exhibit E, Martin Dep., p. 159-60; Exhibit F, Gold Dep., pp. 98, 113-14 and Gold Dep. Ex. 4).

In his Response Plaintiff argues that he was more qualified for the Regional Manager position than any of the other applicants because:

- he has a Master Degree in Business Management and all the other applicants have only Bachelor's Degrees (Dkt. #10, Exhibit 23, Candidate Resumes).

- he had been successfully selling Defendant's proprietary products, the products that would be sold by the salespersons the Regional Manger would oversee, since he had begun his employment with Defendant in 1997 (Dkt. #10, Exhibit 2, White Dep., p. 14 and Exhibit 24), while Freed's sales experience was with devices and not pharmaceuticals (Dkt. #10, p. 25 and Exhibit 13, Kuntz Dep., pp.140-143).[6]

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[6] In his Response Plaintiff indicates that Interviewer Kunz "admits" concerns about Freed's lack of experience selling Baxter's proprietary pharmaceuticals, quoting a portion of Kunz's deposition. Yet Plaintiff neglected to quote the portion of the deposition immediately following this quote in which Kunz explains that

> Maggie did a wonderful job of handling that issue. We talked about the progress she had made relative to pharmaceutical product knowledge over the previous two years. We talked about the various types of training programs that she helped design, which a big part of that was pharmaceutical, and about the fact that she had attended all of the training classes more than once and she had made a lot of progress in terms of product knowledge. She also worked in the field with reps and had experienced sales calls, all the things a typical rep would experience. Was it still a bit of a concern? Absolutely, because she was the one of all the candidates who had

- he had worked for 3 years as a TCS which required educating physicians, anesthesia students and nurses at several hospitals regarding the proprietary products (Dkt. #10, Exhibit 13, Kunz Dep., p. 32), i.e. he was held to a "higher standard in terms of product knowledge" and was a "super sales person" (*Id.* at 35).

- Phillips thought Plaintiff would be a good fit for the position and had informed Gold of such prior to the interviews (Dkt. #10, Exhibit 4, Phillips Dep., pp. 99-100).

Review of Candidate Documents Prior to Interviews[7]

Interviewer Kunz was asked a series of questions in his deposition regarding the interview process for

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never sold or carried a bag of pharmaceutical products, soto speak, early in her career, so it was a topic that we talked a lot about.

(Dkt. #10, Exhibit 13, Kunz Dep., p. 142-143).

[7] Defendant Baxter conducts Organized Talent Reviews (OTR) of employees for development proposes in which groups of managers highlight the strengths and interests of their employees (Exhibit B, Phillips Dep., p. 90; Exhibit D., Kunz Dep., pp.60-61). Employee Performance Reviews are also completed wherein employees and their supervisors comment on the employees' mid-year and year-end performance in the context of a selected number of "performance management objectives" (PMO) and "success factors" (Dkt. #10, Exhibit 30, White 2004 Performance Evaluation). For sales persons the first PMO is sales and this PMO is weighted 70% (Dkt. #10, Exhibit 31).

the Regional Manager position and responded as follows:

Q – How about . . . qualifications . . .

A – I usually review their resume with them and then given [sic] them the opportunity to add to that resume. . . . .

Q – If the candidate is already employed with Baxter, do you ever look at their performance reviews?

A – Of course.

Q – Is that pretty standard?

A – Yes.

Q – Do you recall if you looked at the performance reviews for the five candidates for the region manager position . . . .

A – As a matter of fact, I don't know that I looked at each of them specifically. I know I had access to Bret Corrick's

. . . . .

A – You know, to be honest with you, I did not specifically review their performance review before that interview. That's not a fair statement.

Q – It's not a fair statement to say that you did review them?

A – Yes. So, I am correcting myself.

Q – Previously had you typically reviewed performance reviews before conducting interviews?

A – I could. I wouldn't say it's a standard protocol with me but --

Q – Any reason you didn't in this case?

A – Well, because I was part of the final interview team. If this had been me doing the interviewing, you know, at an early stage, I would have been more focused on such things.

(Dkt. #10, Exhibit 13, Kunz Dep., p. 82-84).

Interviewer Gold testified that he referred to the Organizational Talent Review (OTR) process at some point, but did not review the performance reviews because it would already have been done at this stage of the interview process:

Q – When you go to review the OTR process when you determine that a position is open and I think you indicated with respect to this central Midwest region manager position that you did look at the OTR process, that's something that you already had in your possession?

A – I looked at what the managers – who the managers presented in their OTR process, you know, who they said that they felt based on their filed visits, working with them, based on track record, based on things like, you know, how they perceive them working with reps and did they have the skill sets, we looked at all.

That's what we looked at and they bring their recommendations to me.

Q – And is it fair to say at the time of the interviews for this central Midwest region manager position that you did not consider Todd White to be a high potential based on your review of the OTR process?

A – Yes.

Q – Is there anything specifically that you looked at that demonstrated to you or reflected that he was viewed upon by his managers as not being a high potential?

A – Yes.

Q – And what was that?

A – Well, Todd was not – in this case was not referred to as a team player. . . . .

(Dkt. #10, Exhibit 21, Gold Dep. pp. 62-63)

Q – Coming into the interviews did you have a ranking in mind based upon their resumes?

A – No.

Q – Did you look at prior performance reviews for the candidates prior to the interviews?

A – I knew that all the candidates, they all had a good track record and outside of that, no.

> Q – Typically when you would interview someone for a region manger position, would you look at their performance reviews?
>
> A – That was already done in most cases with these five candidates that came in. I mean, we knew that they – these folks based on the OTR process. I mean, we knew that they had made numbers in the past and that they wouldn't have been interviewed.

(*Id.* at pp. 102-103).

Interviewer Martin testified that she did not review any of the candidates resumes or performance evaluations before the interviews (Dkt. #10, Martin Dep., pp. 104, 149).

Trade Relations Manager

In his complaint Plaintiff alleged that he was denied access to another position, Trade Relations Manager, which opened in December 2003, because it had not been posted. In Defendant's motion the following undisputed facts are presented:

- The position was posted on Baxter's intranet (Exhibit E, Martin Dep., pp. 85-98 and Exhibit 17).

- At least three candidates were interviewed for this position (*Id.* at 97).

- Plaintiff did not apply for this position (Exhibit A, Plaintiff Dep., pp. 224-26, 251-57).

Sales Trainer

On December 7, 2004, Scott Vickers notified Plaintiff via email of an opening for a Sales Trainer position (Dkt. #10, Exhibit 28). When Plaintiff told Tim Phillips that he was interested in this position, Phillips discouraged him from applying for it at that time (Exhibit A, Plaintiff Dep., pp. 242-44). Phillips emailed Plaintiff saying "with everything you have going on in your life and your Suprane where it is, I am not sure this is the wisest move at this particular time. The time commitment is huge . . . probably on average 3-5 days a month away from home (maybe more . . .). There will be other opportunities in 2006 if you are still interested in pursuing this. . . . ." (*Id.*).

Phillips did not communicate with Scott Vickers about Plaintiff or his candidacy (Exhibit B, Phillips Dep., pp. 106-108).[8] Plaintiff did not apply for the Sales Trainer position (Exhibit A, White Dep., p. 281).

Interviewing Skills Class

After Plaintiff was not selected for the Regional Manager position, Carl Gold told Plaintiff that he should take an interviewing skills class (Exhibit F, Gold Dep., pp. 106-07). Plaintiff asked Phillips for assistance in obtaining an interviewing skills class. Plaintiff alleges that Phillips blocked him from

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[8] Plaintiff alleges that after Phillips discouraged him from applying for the Sales Trainer position, Vickers then discouraged him from applying and purports to attest to this in his own attached affidavit (Dkt. # 10, p. 27). Yet, Plaintiff's affidavit does not mention Vickers or the Sales Trainer position (Dkt. #10, Exhibit 1).

accessing an interviewing skills class. In its motion for summary judgment Defendant provided evidence to support the following undisputed facts:

- On October 25, 2004, Phillips sent an email to the Baxter Institute for Learning and Development inquiring about an interview class.

- He received a response on the following day, which he forwarded to Plaintiff, saying that insufficient funds existed in the budget for such a class in 2004 and it was "questionable for 2005" and providing a contact for counselors who specialize in career development and interviewing skills (Exhibit A, Plaintiff Dep., pp. 221-22 and Dep. Ex. 26).

2004 Performance Review

Before 2004, ACCO rated sales representatives as either "exceed expectations," "meets expectations," or "does not meet expectations." If a sales representative did not meet his or her sales goals, that representative could not be rated anything higher than a "does not meet." Further, a representative rated as "does not meet" generally could not receive a pay raise (Exhibit A, Plaintiff Dep., p. 261; Exhibit B, Phillips Dep., pp. 57-58; Exhibit D, Clark Dep., p. 98).

In 2004, ACCO created for the first time a category of "meets minus" so that a sales representative who does not meet his or her sales goals could avoid a "does not meet" rating, and thus still receive a raise (Exhibit D, Clark Dep., p. 98).

In 2004, Plaintiff did not meet his sales numbers in all categories (Exhibit A, Plaintiff Dep., p. 260). For the four proprietary products that Plaintiff sold in 2004 his year-end sales numbers were as follows: Suprane, 92%; Brevibloc,105%; TDS,101% and PSA, unknown (Dkt. #10, Exhibit 30, p. BAX000531). In his 2004 performance review he was rated "does not meet" for the sales PMO based on these numbers (*Id.*). In total he received 2 "exceeds", 3 "meets", and 2 "does not meet" ratings for 2004 (*Id.* at pp. BAX000531-533).

On the final page of the 2004 performance review Phillips indicated that Plaintiff's overall score should have been a "does not meet" but that "due to [Plaintiff's] diligence and commitment to the business that has been demonstrated by his focus on Suprane and his consistent work in the Region, I have moved this rating to a Meets (-). . . . . In addition, at Mid-Year 2005, I will expect that Todd is achieving budget in 2 of 4 categories, one of them being Suprane. Otherwise further corrective action may be needed. Todd has overachieved in the past so I know he [sic] capable with a dedication of more focus on his Baxter ACC franchise" (*Id.* at BAX000538). Plaintiff received a raise in 2005 based on the 2004 review (Exhibit A, Plaintiff Dep., pp. 260-63).

Phillips testified that he awarded Plaintiff the highest rating he could award based on the sales numbers (Exhibit B, Phillips Dep., pp. 56-65 and Dep. Ex. 2). Gold had sent out an email to the Regional Managers in October of 2004, which Phillips forwarded to Plaintiff, indicating that any sales representative with Suprane sales less than 95% was to receive a "does not meet" rating, no salary increase and be

placed on a performance improvement plan or "PIP" (Dkt. #10, Exhibit 26).

Plaintiff argues that Defendant's "2004 Grid PMO Evaluation For TCS' (attached as Appendix 1) dictates that he should have received a "meets" rating, because he was at 100% in 2 of 4 categories, one being Brevibloc. Plaintiff points to two white TCS who were supervised by Phillips, Stephen Morris and Theresa Thomas, and who also did not meet all of their sales goals but were not given a "does not meet" rating Plaintiff received (Dkt. #10, Exhibits 40, 41).[9] The following table depicts a comparison of these three TCS' ratings for their 2004 Employee Performance Reviews:

[9] Plaintiff also provided data on a number of persons that are not supervised by Phillips.

PMO	Plaintiff	Thomas	Morris
1 - Sales Budget	Suprane 92%; Brevibloc 105% TDS 101%	Suprane 107%; Brevibloc 87% TDS 119%	Suprane 103%; Brevibloc 93% TDS 157%
	Does Not Meet	Meets	Meets[10]
2 - SRNA/Residents Tracking Tool	Exceeds	Meets	Exceeds
3 - Speaker/Advocate Development	Meets	Meets	Exceeds
4 - Achieve Key Company Objectives	Meets	Exceeds	Meets
5 - Prudent Expense/ Resource Management	Exceeds	Exceeds	Meets

[10] In the performance review Phillips indicated that he moved Morris' sales PMO up to a "meets" because "of Steve's superior performance with Suprane".

PMO	Plaintiff	Thomas	Morris
6 - Ensure Strong Communication	Meets	Exceeds	Meets
7 - Suprane Incentive Contest	Does Not Meet	Meets	Meets
Overall	**Meets-**	**Meets**	**Meets**

2002 Stock Option Awards

While Baxter's ACCO business usually does not award stock options to sales representatives, it decided to award a stock options to certain sales representatives in 2002 (Exhibit H, Taylor Decl. ¶¶ 3-4). Of the approximately 170 ACCO sales representatives employed in 2002, twelve of them received stock options (*Id.* at ¶ 7). Those twelve were selected because they were considered at the time to be high performers with high potential, and they were believed to be a retention risk (that is, a Baxter employee who might leave). Plaintiff was not awarded stock because he was not considered to fit this criteria (*Id.* at ¶ 6, 8).

Hostile Work Environment

Tim Phillips

When Plaintiff explained to Phillips that he thought the timing of a January 2004 sales meeting, that commenced with a dinner on Martin Luther King Day, was insensitive, Phillips allegedly said to him, "Nobody wants to be around a black man" (Exhibit A, Plaintiff Dep., pp. 42- 45, 109-10).[11]

Phillips allegedly referred to Plaintiff, Todd White, as "White, Todd" when he answered a telephone call

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[11] Phillips made a similar comment to a former sales trainee, Jacinta Toland in October 1999 (Dkt. #10, Toland Affidavit, Exhibit 20, ¶7).

from Plaintiff in late 2004[12] (Exhibit A, Plaintiff Dep., p. 48).

In early 2005, the name of Tanisha Gabriel, an African-American sales representative who works in another territory came up in conversation and Phillips allegedly remarked, "Oh, that black girl" (Exhibit A, Plaintiff Dep., pp. 39-41).

In January 2005, Phillips circulated an e-mail to all those that reported directly to him, in which an image morphed back and forth between Osama bin Laden and O.J. Simpson, with a caption "I knew it! I knew it!" (Exhibit A, Plaintiff Dep., pp. 114-22, Exhibit 17; Exhibit B, Phillips Dep., pp. 117-19).

Co-Workers

Plaintiff alleges that Scott Bondy, an ACCO sales representative who sells devices in a territory that overlaps with Plaintiff's teaching center territory (Exhibit A, Plaintiff Dep., pp. 60-61), made the following comments to him:

a. When Plaintiff won the Distinguished Service Club ("DSC") award, Bondy told Plaintiff that no black man had ever won a DSC before (Exhibit A, Plaintiff Dep., p. 98).

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[12] Plaintiff does not give an exact date for this conversation, but it is alleged to have taken place after Scott Vickers sent the email to Plaintiff regarding the Sales Trainer position (*Id.*), which was sent December 7, 2004 (Dkt. #10, Exhibit 28).

b. When Plaintiff lived either in Southfield or Farmington Hills, Bondy once remarked that he would not go to Plaintiff 's house because he was afraid he'd be robbed or that someone would break into his car (Exhibit A, Plaintiff Dep., pp. 100-01).

c. In 1999, Plaintiff picked up Bondy at Bondy's house, and Bondy's dog barked. Bondy remarked that, "My dog has never seen a black person besides the UPS man, so that's why he's barking like this." (Exhibit A, Plaintiff Dep., pp 103-05).

d. Bondy and sales representative Scott Huber referred to Plaintiff as "Lee Elder," a famous black golfer, during golf outings (Exhibit I, Bondy Dep., pp. 21-22).

e. Bondy referred to Plaintiff as "Whitey."[13]

f. On an occasion on which Plaintiff cannot place a date, Bondy commented that the nurses at a hospital were like slaves, and then said to Plaintiff , "no offense, Todd." (Exhibit A, Plaintiff Dep., pp. 92-93).

g. On an occasion on which Plaintiff cannot place a date, Bondy told Plaintiff that he "saw a black squirrel and it reminded me of you," to which Plaintiff responded, "that's mighty white of you." (Exhibit A, Plaintiff Dep., pp. 87-91).

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[13] When Plaintiff told Bondy that "Whitey"might be regarded as racially offensive, Bondy thanked him for bringing that to his attention and ceased referring to Plaintiff by that nickname (Exhibit I, Bondy Dep., p. 24).

h. On October 26, 2000, Bondy sent an e-mail to a number of his peers, including Plaintiff, that Plaintiff found racially offensive because it contained a joke about a hands-free cellular phone adapter with a picture showing a man wearing a rubber band attaching a cellular phone to his head. The man in the picture was black (Exhibit A, Plaintiff Dep., pp. 96-7 and Plaintiff Dep. Ex. 13).

i. At a regional meeting hosted by Plaintiff's manager, Dick Clark, on January 30 through February 1, 2001, Bondy allegedly made a number of comments Plaintiff found racially offensive:

(i.) Bondy told a joke to Plaintiff: "What's long and hard on a black guy? The third grade" (Exhibit A, Plaintiff Dep., pp. 78-79). Plaintiff recalled that only the two of them were present.

(ii.) Bondy remarked that "black people don't ski" (Exhibit A, Plaintiff Dep., pp. 81-85). Plaintiff recalled that other people were present, but did not recall who. He did not recall whether Clark was present, but did recall that he did not report the incident.

(iii) In front of other sales representatives and manager Dick Clark, Bondy commented to Plaintiff , "you're pretty handsome for a black guy" (Exhibit A, Plaintiff Dep., pp. 61-72).

j. In early 2002, Plaintiff told Bondy that Plaintiff's wife was pregnant. Bondy replied, "are you the father" which Plaintiff interpreted as a racial comment (Exhibit A, Plaintiff Dep., pp. 65-66).

Baxter's Knowledge/Action

As mentioned above, manger Dick Clark heard Bondy remark about Plaintiff, "you're pretty handsome for a black guy." According to Plaintiff, Clark approached Plaintiff and asked whether Bondy was bothering him, to which Plaintiff replied that he was (Exhibit A, White Dep., p. 67). Plaintiff said that Clark indicated that he did not agree with Bondy's behavior and could have him terminated. Clark testified that he was angered at hearing the comment and remembered saying "as far as I was concerned I would – you know, I believe something like the words came out, 'Fire Mr. Bondy' "(Exhibit D, Clark Dep., p. 46). Plaintiff told Clark that he wanted to speak with Bondy himself (*Id.*; and Exhibit A, White Dep., p. 67). Clark testified that he told Plaintiff, "Todd, I don't feel comfortable about that. I want to take this thing through the whole process" (Exhibit D, Clark Dep., p. 48).

Plaintiff met Bondy at a Cracker Barrel restaurant and talked with him about the situation (Exhibit A, White Dep., p. 67, 72).

Clark reported this event to his manager Wally Candelario, who was angry about the comment (Exhibit D, Clark Dep., p. 47). Clark requested that Candelario not take any action because Plaintiff had told Clark that Plaintiff would take care of the matter (*Id.* at 48). Regardless, Clark did speak with Scott Bondy and told him that such comments were not permitted (*Id.* at 52). Plaintiff sent Clark a thank you card acknowledging Clark's actions concerning this event (Exhibit A, White Dep., pp. 68; Exhibit D). Plaintiff never complained to Clark about Bondy again (Exhibit D, Clark Dep., pp. 135-36).

Plaintiff testified that he understood that if he experienced or witnessed discrimination or harassment at Baxter, he had the right to report it either to his supervisor, manager, a human resources representative, or any other member of management (Exhibit A, Plaintiff Dep., pp. 22-24, and Plaintiff Dep. Exhibit 2). Plaintiff took anti-harassment training classes, which provided information on the avenues by which to report harassment (Exhibit A, Plaintiff Dep., pp. 24-26, and Plaintiff Dep. Exhibit 3).

It is undisputed that Plaintiff never reported the comments, jokes, or e-mails that he considered racist to Baxter management or human resources (Exhibit A Plaintiff Dep., pp. 65-66, 78-79, 81-85, 87-91, 92-93, 96-97, 100-01, 103-05, 109-10, and 122-31).

III. ANALYSIS

A. Hostile Work Environment

Defendant argues that Plaintiff's hostile work environment claims are time-barred and without merit, to which Plaintiff provides no legal argument except to say that "[t]he myriad demeaning comments of [Plaintiff's] co-workers and supervisor demonstrate the racially discriminatory climate" (Dkt. #10, p. 4).

For federal courts to exercise jurisdiction over Title VII claims, the claimant must first present the claim to the Equal Employment Opportunity Commission (EEOC) or equivalent state entity. *Bellamy v. Fritz*, 129 Fed. Appx. 245, 247, 2005 WL 953847, *1 (6th Cir. 2005). "Michigan's Department of Civil Rights is a state entity with authority to grant or seek relief with respect to such claims, and therefore any claim filed

with the Department of Civil Rights must be filed within three hundred days of the last act that contributed to the creation of a hostile work environment." *Id.*, citing 42 U.S.C. § 2000e-5(e)(1). A Title VII action must be filed within three hundred days of any act that is part of the hostile work environment. *Nat'l R.R. Passenger Corp. v. Morgan*, 536 U.S. 101, 117-19 (2002). Plaintiff filed his EEOC claim on February 3, 2005. The acts alleged to have taken place within 300 days of the EEOC filing date are: Phillips' referring to a co-worker as "oh that black girl"; referring to Plaintiff as "White, Todd"; circulating the email of Osama Bin Laden morphing into O.J. Simpson. Under *Morgan*, prior acts falling outside the 300 day filing period may also be taken into consideration, provided they are part of the same hostile work environment. *Id.* at 118-119.[14]

Elliot-Larsen claims are not subject to the continuing violations doctrine and must be filed within three years of the date a cause of action accrues – an employee is not permitted to bring a lawsuit for employment acts that accrue beyond this period. *Garg v. Macomb County*, 696 N.W. 2d 646, 659 (Mich. 2005). Plaintiff filed this lawsuit on March 28, 2005. The acts alleged to have taken place within 3 years of this filing date are: those listed in the paragraph above plus the

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[14] But note that if an employer intervenes at some point, this may preclude past acts from being included in a current hostile environment claim. *Id.* at 118 ("On the other hand, if an act on day 401 had no relation to the acts between days 1-100, or for some other reason, such as certain intervening action by the employer, was no longer part of the same hostile environment claim, then the employee cannot recover for the previous acts, at least not by reference to the day 401 act.").

comment by Phillips, "Nobody wants to be around a black man".

In *Jones v. R.R. Donnelley & Sons*, 541 U.S. 369 (2004), the Supreme Court adopted a four year statute of limitations for claims under 42 U.S. §1981. The acts alleged to have taken place within 4 years of this filing of the complaint are: those listed in the paragraphs above plus the comment by Plaintiff's co-worker Scott Bondy, upon hearing that Plaintiff's wife was expecting a baby, "Are you the father?"

The elements of a hostile work environment claim under Title VII, §1981 and Elliot Larsen are virtually identical. Plaintiff must show that (1) he belongs to a protected group; (2) he was subject to unwelcome harassment; (3) the harassment was based on his race and (4) the harassment affected a term, condition, or privilege of his employment. *Moore v. KUKA Welding Systems & Robot Corp.*, 171 F.3d 1073, 1078-1079 (6th Cir. 1999)(Title VII and Elliot-Larsen); *Hafford v. Seidner*, 183 F.3d 506, 512 (6th Cir.1999) (§1981).

Under the federal statutes, an employer is vicariously liable "for an actionable hostile work environment created by a supervisor with immediate (or successively higher) authority over the employee." *Ellerth*, 118 S.Ct. at 2270. When no tangible employment action is taken, an employer may raise an affirmative defense to liability by proving, by a preponderance of the evidence, that (1) it exercised reasonable care to prevent and correct promptly any racially harassing behavior, and (2) the plaintiff employee unreasonably failed to take advantage of corrective opportunities provided by the employer. *See id.* Conversely, under state law, vicarious liability will

be found only where the plaintiff has carried the burden of proving respondeat superior. "This ordinarily requires a showing that either a recurring problem existed or a repetition of an offending incident was likely and that the employer failed to rectify the problem on adequate notice. *Radtke v. Everett*, 501 N.W.2d 155 (1993). Notice . . . sufficient to impute liability to the employer exists where, 'by an objective standard, the totality of the circumstances were such that a reasonable employer would have been aware of the substantial probability that [ ] harassment was occurring.'" *Chambers v. Trettco, Inc.*, 624 N.W.2d 543, 544 - 545 (Mich. App. 2001) (citations omitted).

As for the acts of co-workers, under both state and federal law, a plaintiff may hold an employer directly liable if she can show that the employer knew or should have known of the conduct, and that its response manifested indifference or unreasonableness. *See Blankenship*, 123 F.3d at 873 (citing *Pierce v. Commonwealth Life Ins. Co.*, 40 F.3d 796, 805 (6th Cir.1994)). Significantly, a court must judge the appropriateness of a response by the frequency and severity of the alleged harassment. *See Erebia v. Chrysler Plastic Prods. Corp.*, 772 F.2d 1250, 1252-53 (6th Cir.1985). Generally, a response is adequate if it is reasonably calculated to end the harassment. *See Intlekofer v. Turnage*, 973 F.2d 773, 778 (9th Cir.1992) (citing *Katz v. Dole*, 709 F.2d 251, 256 (4th Cir.1983)). *Jackson v. Quanex Corp.* 191 F.3d 647, 663 (6th Cir. 1999).

In the present case it is undisputed that Plaintiff did not report to Defendant regarding any of the harassing actions or comments about which he now complains, though he testified that he knew that

Defendant had a anti-harassment policy. It is further undisputed that on the one occasion in which Defendant can be said to have had knowledge that Bondy made an inappropriate comment, i.e. when Plaintiff's supervisor, Clark, overhear Bondy say that Plaintiff was "pretty handsome for a black guy", Clark took action and offered to inquire about having Bondy fired, and it was Plaintiff that asked that nothing be done and he be allowed to handle the situation. And, while it is true that racially harassing conduct be a co-worker need not be reported in order to be actionable, *Jackson v. Quanex Corp.*, 191 F.3d 647, 663 (6th Cir. 1999), Plaintiff's deposition testimony indicated that all of Bondy's comments were made outside of the presence of Defendant's authorities with the exception of the comment overheard by Clark, and Plaintiff has offered no other explanation for how Defendant was to learn of the offensive behavior beyond his reporting it.

Further, Plaintiff has not attempted to make a showing that the harassment affected a term, condition, or privilege of his employment. The Court has merely been provided with a list of comments and jokes, many albeit in very poor taste and some decidedly racist, that have been made to or in the presence of Plaintiff during his tenure with Defendant, many without date reference. Yet a hostile environment is present only when the workplace is "*permeated* with 'discriminatory intimidation, ridicule, and insult,' that is 'sufficiently severe or pervasive to alter the conditions of the victim's employment and create an abusive working environment,'" – "'mere utterance of an . . . epithet which engenders offensive feelings in a employee,' does not sufficiently affect the conditions of employment to implicate Title VII." *Harris v. Forklift Systems, Inc.* 510 U.S. 17, 21 (1993).

The non-time-barred comments do not meet the required frequency or severity necessary to support a claim of a racially hostile work environment against an employer. It goes without saying that the Court is not condoning the making of such ignorant comments by offending individuals, but the request to attribute these to the employer cannot be granted without a proper showing.

Plaintiff further fails to make a showing that he was reasonable in failing to take advantage of corrective opportunities provided by Defendant with regard to the alleged harassment by Phillips or that Defendant knew or should have known about the alleged harassment by Bondy other than the one comment noted above. In sum, Plaintiff's hostile work environment claims should be dismissed pursuant to Fed. R. Civ. P. 56.

B. Title VII and Elliot-Larsen Claims Regarding Regional Manager Position

In the context of his failure-to-promote claim Plaintiff seeks to use indirect evidence to support his claim and therefore must demonstrate: (1) he is a member of a protected class; (2) he applied for and was qualified for a promotion; (3) he was considered for and was denied the promotion; and (4) an individual of similar qualifications who was not a member of the protected class received the job at the time Plaintiff's request for the promotion was denied. *White v. Columbus Metropolitan Housing Authority*, 429 F.3d 232, 240 (6th Cir. 2005).

The parties appear to agree that Plaintiff is able to satisfy his *prima facie* case. Under the *McDonnell*

Douglas framework the burden shifts to Defendant to proffer a legitimate, non-discriminatory reason for plaintiff's rejection. *McDonnell Douglas v. Green*, 411 U.S. 792, 802 (1973).

Defendant provides the following as its legitimate nondiscriminatory reason for selecting Freed over Plaintiff for the Regional manager position: Freed had management experience, fared better than Plaintiff in the interview for the position, had significant sales experience and product knowledge (albeit not from direct sales) and presented specific ideas for "turning around the region".

She also answered their initial concerns that she had no direct experience selling Defendant's proprietary pharmaceuticals by explaining that she had taken the training on the products more than once and had organized and taught trainings on the new products to new sales representatives. It is undisputed that Plaintiff had knowledge of and sales experience with Defendant's proprietary pharmaceuticals. Plaintiff also had a Masters' Degree in management. Yet, Defendant explains that Plaintiff did not fare well in the interview and the decisionmakers all rated him fifth of the five candidates.

Upon Defendant's presentation of a legitimate non-discriminatory reason for its decision, the burden then shifts back to Plaintiff to demonstrate that the offered legitimate reasons are pretextual. *Id.* at 804. A Plaintiff establishes pretext by showing that the reason offered by the defendant: (1) has no basis in fact; (2) did not actually motivate the decision not to promote, or (3) was insufficient to warrant the decision not to promote. *Zambetti v. Cuyahoga Community*

College, 314 F.3d 249, 258 (2002) (citing *Manzer v. Diamond Shamrock Chem. Co.*, 29 F.3d 1078, 1084 (6th Cir.1994)); *Dubey v. Stroh Brewery Co.*, 185 Mich. App. 561, 565-566, 462 N.W.2d 758 (1990).

A plaintiff's burden of proving pretext differs under the federal statutes and Elliot Larsen. The Michigan Courts require that plaintiffs satisfy the "pretext-plus"standard, meaning that "plaintiff must not merely raise a triable issue that the employer's proffered reason was pretextual, but that it was a pretext for . . . discrimination. Therefore, "we find that, in the context of summary disposition, a plaintiff must prove discrimination with admissible evidence, either direct or circumstantial, sufficient to permit a reasonable trier of fact to conclude that discrimination was a motivating factor for the adverse action taken by the employer toward the plaintiff. *Lytle,* 579 N.W.2d at 916 (footnotes omitted); *see also Town v. Michigan Bell Telephone Co.*, 455 Mich. 688, 568 N.W.2d 64, 68-69 (1997)." *Millner v. DTE Energy Co.*, 285 F.Supp.2d 950, 970 (E.D. Mich. 2003).

For the purposes of the federal statutes, pretext can be established by "(1) a direct evidentiary showing that a discriminatory reason more likely motivated the employer *or* by (2) an indirect evidentiary showing that the employer's explanation is not credible. *Carney v. Cleveland Heights-University Heights Sch. Dist.,* 143 Ohio App.3d 415, 428, 758 N.E.2d 234, 245 (2001). However, '[m]ere conjecture that [the] employer's explanation is a pretext for intentional discrimination is an insufficient basis for denial of summary judgment.' *Carney,* 758 N.E.2d at 245. To avoid summary judgment, the plaintiff is required to produce evidence that the employer's proffered reasons were

factually untrue. *Id.* (citing, *Reeves v. Sanderson Plumbing Prods., Inc.*, 530 U.S. 133, 143, 120 S.Ct. 2097, 147 L.Ed.2d 105 (2000).)." *Peters v. Lincoln Elec. Co.*, 285 F.3d 456, 470 (6th Cir. 2002) (emphasis supplied).

In support of his argument that Defendant's offered reasons for hiring Freed are pretext Plaintiff argues that (a.) the interviewers did not review the candidates performance reviews, which Plaintiff alleges was part of their normal hiring procedure; (b.) it is incredulous that he did not fare well in the interview because he makes his living as a sales person; and (c.) his qualifications were better suited for the position than Freed's.

Plaintiff quotes Interviewer Kunz as having said that it was standard protocol for interviewers to review candidates performance reviews (Dkt. #10, p. 29). Yet, Kunz corrected himself within several questions to say that reviewing performance reviews was not actually a standard protocol and that he had not done so in this case because he was part of the final interview team and assumed it had been done at an earlier stage (Dkt. #10, Exhibit 13, Kunz Dep., p. 84). Because this is the only evidence on which Plaintiff relies in support of his contention that a review of performance evaluations should have been done by Interviewers Gold, Kunz and Martin, Plaintiff cannot rely on their failure to review performance reviews to show pretext. In any event, an employer's failure to follow self-imposed regulations or procedures is generally insufficient to support a finding of pretext. *See Fischbach v. D.C. Dep't of Corr.*, 86 F.3d 1180, 1183 (D.C. Cir.1996); *Randle v. City of Aurora*, 69 F.3d 441, 454 (10th Cir. 1995). Further, there is no

allegation that some of the candidates were treated more favorably in this regard – no documents were reviewed by the interviewers for any candidate. And, as Defendant points out, a review of the documents would have not have put Freed in a worse position to obtain the position, as her performance reviews were the same or better than Plaintiff's. There simply is no direct or circumstantial evidence to support this argument for pretext.

Plaintiff's bald allegation that he could not have fared as poorly in the interview as the interviewers have testified he did will not suffice to defeat Defendant's Rule 56 evidence to the contrary. Nor is it sufficient that Plaintiff feels his qualifications were superior to Freed's. *Vredevelt v. GEO Group, Inc.*, 145 Fed. Appx. 122, 131, 2005 WL 1869607, *8 (6th Cir. 2005) (plaintiff's allegation that she was more qualified for the position than other candidate is unpersuasive. "At best, the comparison in this case is between two qualified employees."); *Johnson v. United States Dep't of Health and Human Servs.*, 30 F.3d 45, 47-48 (6th Cir.1994); *Mitchell v. Toledo Hosp.*, 964 F.2d 577, 584 (1992) (holding that the plaintiff's subjective skepticism regarding the truth of an employer's representation does not raise a triable issue as to pretext).

Plaintiff argues that because Freed did not actually sell Defendant's proprietary pharmaceuticals she *had* to have inferior knowledge than he who had been selling them for years. Yet this does not address Defendant's argument that the interviewers were satisfied with Freed's product knowledge, which Freed had obtained through other means, i.e. by taking

product classes and designing and implementing the training classes.

The alleged deposition testimony of Freed wherein she admits to feeling nervous when disciplining one of her direct reports is not alleged to have been available and/or considered by the interviewers. Furthermore, though Plaintiff is undisputedly a highly regarded salesperson, he did not proffer any evidence that he had management experience. Therefore, while Plaintiff argued that Defendant could not have honestly relied on Freed's management experience because she had only two direct reports, implying that this is too few, it appears that Plaintiff had even less management experience.[15]

The choice between Freed and Plaintiff boils down to a business judgment. The soundness of an employer's business judgment may not be questioned as a means of showing pretext for the purposes of surviving summary judgment on Plaintiff's Elliot Larsen claim. *Dubey, supra*, 185 Mich App. at 566. For the purposes of Title VII, while absolute deference to ones business judgment is not required, the reasonableness of an employer's decision may only be considered "to the extent that such an inquiry sheds light on whether the employer's proffered reason for the employment action was its actual motivation.

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[15] Plaintiff did provide the affidavit of a co-worker, Greg Hall, whom he mentored, as proof that he had the capability to be a good manager (Dkt. #10, Exhibit 46, Hall Affidavit). Yet the opinions expressed by co-workers who had no direct involvement in the decision making process at issue are not probative of a defendant's discriminatory intent. *Haley v General Elec. Co.*, 3 Fed. Appx 240, 248 (6th Cir. 2001).

Smith v. Chrysler Corp., 155 F.3d 799, 807 (6th Cir. 1998)." *Wexler v. White's Fine Furniture, Inc.*, 317 F.3d 564, 576 -577 (6th Cir. 2003).

Here, Plaintiff has not provided sufficient direct or circumstantial evidence to support his argument that the Defendant's non-discriminatory reasons for choosing Freed over Plaintiff for the position of Regional Manager contain such errors of judgment that would allow a reasonable jury to opine that the reasons were pretextual. Therefore, his Title VII and Elliot-Larsen race discrimination claim regarding Defendant's failure to promote him to Regional Manager should be dismissed.

C. Title VII and Elliot-Larsen Claims Regarding 2004 Performance Review

In his Response Plaintiff argued that the evidence surrounding his 2004 performance review supports a case of unlawful discrimination under Elliott-Larsen and Title VII pursuant to a mixed motive theory.

The Supreme Court first recognized the mixed-motive theory in *Price Waterhouse v. Hopkins*, 490 U.S. 228, 258 (1989) (plurality opinion), where the Court held that a plaintiff could shift the burden of proof to the employer to prove an affirmative defense upon a showing that the protected characteristic "played a motivating part in an employment decision." *Id.* The employer would then be held liable unless it "prov[ed] by a preponderance of the evidence that it would have made the same decision even if it had not taken plaintiff's [protected trait] into account." *Id.* An employer may still avoid liability in this manner in an Elliot-Larsen cause of action. *Harrison v. Olde*

Financial Corp., 572 N.W.2d 679, 684 (Mich. App. 1997). Yet, proof that an employer would have reached the same result without any discriminatory animus in a Title VII case only limits the remedies available to a plaintiff, but does not serve as a complete shield from liability. 42 U.S.C. §2000e-5(g)(2)(B); *Marbly v. Rubin*, 188 F.3d 508, 1999 WL 645662, *2, fn 2 (6th Cir. 1999); *Costa v. Desert Palace*, 299 F.3d 838, 850-51 (9th Cir. 2002)(explaining that the 1991 Amendments to Title VII were intended to overrule the Supreme Court's holding in *Price Waterhouse*) *aff'd, Desert Palace, Inc. v. Costa*, 539 U.S. 90 (2003).[16]

The 1991 Title VII statutory provisions also codified the mixed-motive "alternative for proving that an 'unlawful employment practice' has occurred." *Desert Palace*, 539 U.S. at 94 (quoting 42 U.S.C. § 2000e-2(m)). The provision states that a plaintiff can raise a mixed-motive Title VII claim by "demonstrat[ing] that race, color, religion, sex, or national origin was a motivating factor for any employment practice, even though other factors also motivated the practice." 42 U.S.C. § 2000e-2(m) (emphasis added). If the plaintiff makes such a showing, he is entitled to relief.

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[16] The 1991 Act also provides that the employer's liability will be limited to injunctive and declaratory relief and attorney fees and costs if the employer can establish that it "would have taken the same action in the absence of the impermissible motivating factor." *Id.*; §2000e-5(g)(2)(B). The declaratory and injunctive relief may not include "an order requiring any admission, reinstatement, hiring, promotion, or payment." *Id.*; §2000e-5(g)(2)(B)(ii).

In 2003, the Supreme Court unanimously interpreted the 1991 Civil Rights Act to allow plaintiffs to bring mixed-motive discrimination claims based solely on circumstantial evidence. *Desert Palace*, 539 U.S. at 101-02. Yet, Michigan state courts continue to require direct evidence in order to bring a mixed-motive Elliot-Larsen claim. *Millner v. DTE Energy Co.*, 285 F.Supp.2d 950, 967 (E.D. Mich. 2003) (citing *Sniecinski v. Blue Cross and Blue Shield of Michigan*, 666 N.W.2d 186 (decided July 22, 2003, i.e., more than a month after the U.S. Supreme Court's *Desert Palace* decision) and *Topping v. Ferris State University*, 2003 WL 21508488, *6 (Mich. App., July 1, 2003) (unpublished decision)).

Prior to *Desert Palace*, the Sixth Circuit did not require a plaintiff to present a *prima facie* case or follow the *McDonnell Douglas* burden-shifting framework to get to the jury on a mixed-motive claim. *See, e.g., Cesaro v. Lakeville Cmty. Sch. Dist.*, 953 F.2d 252, 254 (6th Cir.1992). Rather, the employee only needed to show that the illegitimate reason "was a motivating factor in an employment decision," and then "the employer [could] avoid liability only by proving by a preponderance of the evidence that it would have made the same decision even if it had not considered the plaintiff's [race]." *Id.*

> However, now that such mixed-motive claims can be brought based on circumstantial evidence, the question arises as to the effect of *Desert Palace* on the analysis of mixed-motive claims at the summary judgment stage. What is clear from *Desert Palace*, regardless of its impact on the *McDonnell Douglas* framework, is that to succeed on a mixed-motive claim, the

> plaintiff must adduce evidence that the protected characteristic "was a motivating factor" in the employer's adverse employment decision. 42 U.S.C. § 2000e-2(m) (emphasis added). "The ultimate question in every employment discrimination case involving a claim of disparate treatment is whether the plaintiff was a victim of intentional discrimination." *Reeves*, 530 U.S. at 153, 120 S.Ct. 2097. Applying *Desert Palace* and the 1991 Act to this standard, the ultimate question at summary judgment on a mixed-motive case is "whether the plaintiff has presented evidence, direct or circumstantial, from which a reasonable jury could logically infer that [a protected characteristic] was a motivating factor in [the defendant's adverse employment action against the plaintiff]." *Harris v. Giant Eagle, Inc.*, 133 Fed. Appx. 288, 297 (6th Cir.2005) (unpublished opinion) (alteration in original) (internal quotation marks omitted); accord 42 U.S.C. § 2000e-2(m); *Stegall v. Citadel Broad. Co.*, 350 F.3d 1061, 1068 (9th Cir.2003).

Wright v. Murray Guard, Inc., 455 F.3d 702, 712-713 (6th Cir. 2006).

Plaintiff has submitted direct evidence which, if taken as true and in a light most favorable to Plaintiff, establish Phillips' predisposition to discriminate, i.e. Phillips' alleged comments:[17] (1.) to Jacinta Toland in

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[17] Plaintiff also testified that he felt that Phillips' circulation of the email of Osama Bin Laden morphing into O.J. Simpson in

October 1999 "no one wants to work with a black man" (Dkt. #10, Exhibit 20, Toland Dep.); (2.) to Plaintiff on January 14, 2004, "nobody wants to be around a black man" (Dkt. #10, White Dep., Exhibit 2, p. 45); (3.) in answering a telephone call from Plaintiff and referring to Plaintiff, Todd White, as "White, Todd" (*Id.* at 48) and (4.) in Plaintiff's presence in early 2005 referring to a co-worker as "oh that black girl" (Dkt. #10, White Dep., p. 39-41).

Direct evidence of discrimination, however, "must establish not only that the plaintiff's employer was predisposed to discriminate . . . , but also that the employer acted on that predisposition." *DiCarlo v. Potter*, 358 F.3d 408, 415 (6th Cir. 2004) (quotation omitted).

In support of his argument that Phillips acted on his alleged animus Plaintiff points to the following facts:

- Phillips forwarded him an October 22, 2004, email from Gold which had been sent to all Regional Managers in regards to a number of sales representatives, including Plaintiff, that were not meeting their Suprane sales goals and indicated that if the reps' Suprane numbers were not up to 95% by the end of the year they would receive a "does not meet" for their PMO, no salary increase and be placed on a performance improvement plan (PIP) (Dkt. #10, Exhibit 26);

January 2005 was racially motivated (*Id.* at 114-22), but did not submit this as direct evidence in his Response.

- Phillips discouraged him from becoming a sales trainer;

- Plaintiff was not allowed to take an interviewing skills class;

- Plaintiff fared better on previous years' performance reviews, under a different supervisors than he had under Phillips; and

- his 2004 performance review was not "consistent" with Defendant's guidelines.

Yet, it is undisputed that:

- Plaintiff was not meeting his Suprane sales goals at the time Gold sent the email to Phillips, the receipt of the email was not an adverse employment action and Phillips was not the decisionmaker with regard to the email;

- Plaintiff did not apply for the Sales Trainer position, though Phillips admittedly discouraged him from applying;

- Phillips was not the decisionmaker with regard to the interview skills class, Phillips inquired into whether Plaintiff could take an interview skills class and was told that an interview skills class would not be offered for anyone due to budget constraints;

- Plaintiff had not met his 2004 Suprane sales goal by the end of the year and had met his sales goals in the previous years when he had

received more favorable performance reviews; and

- though the 2004 Grid PMO Evaluations For TCS indicate that one can receive a PMO of "meets" for achieving 100% in "2 of 4 categories" as long as one is Suprane or Brevibloc, which Plaintiff met for selling Brevibloc at 107% and TDS at 101%, the fact remains that Gold had indicated to all the Regional Managers in October 2004 that no one that had a Suprane sales number of 95% or less could achieve a rating of anything more than "does not meet" and Plaintiff's Suprane was 92.8%.

The only action in which Phillips was the decisionmaker was the 2004 performance review and Plaintiff does not allege that Phillips' comments depicting racial animus were made in the context of that decision. Instead he appears to ask that the Court infer that if Phillips made the reprehensible comments then any decision he made that negatively affected Plaintiff must have been motivated by his racial animus. Yet, the law is clear, "[d]irect evidence is evidence that proves the existence of a fact without requiring any inferences." *Minadeo*, 398 F.3d at 763 (quoting *Rowan v. Lockheed Martin Energy Sys.*, 360 F.3d 544, 548 (6th Cir.2004)).

Therefore, Plaintiff has failed to provide direct evidence that race was a motivating factor in his 2004 performance review. This is fatal to Plaintiff's Elliot-Larsen mixed-motive discrimination claim. *Millner, supra,* 285 F.Supp.2d at 967.

Although Plaintiff did not raise this issue in his brief, pursuant to the holding in *Desert Palace*, he could still argue a Title VII mixed motive case using circumstantial evidence, i.e. using the *McDonald Douglas* framework. This would entail showing (1.) he is within a protected class; (2.) he was meeting the legitimate expectations of his employer; (3.) he suffered an adverse employment action; and (4.) similarly situated employees not in the protected class were treated more favorably. *Sample v. Aldi, Inc.*, 61 F.3d 544, 548 (7th Cir.1995).

Yet, Plaintiff's claim fails under a mixed-motive theory as well, for two reasons. First, while "[a] determination that an individual is performing a job well enough to meet an employer's legitimate expectations, when made in the context of a prima facie case, may be based solely upon the employee's testimony concerning the quality of his work," *Williams v. Williams Elec., Inc.*, 856 F.2d 920, 923, n. 6 (7th Cir.1988), in the present case the fact that Plaintiff failed to meet his employer's Suprane sales goal is undisputed. Second, the evidence submitted to the Court does not indicate the existence of any similarly situated non-African-Americans who were treated differently with regard to the 2004 performance review.[18] Therefore, even when

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[18] Plaintiff points to the fact that Morris and Thomas, two white employees supervised by Phillips that "were at 100% in 2 of 4 products (one being Suprane or Brevibloc)", as was Plaintiff, were given "meets" for PMO No. 1 (sales) while Plaintiff was given a "does not meet". Yet, it is undisputed that (a.) all Regional Managers had been informed in 2004 that Sales Representatives achieving less than 95% of sales goals for Suprane were to receive a "does not meet" rating (Dkt. #10, Exhibit 26), (b.) Morris and

circumstantial evidence and permissible inferences are considered, his mixed motive Title VII claim fails as well. In sum, there remains no genuine issue of material fact regarding Plaintiff's claim of race discrimination regarding his 2004 performance review.

D. Unaddressed Disparate Treatment Claims

It appears from the lack of attention to the remaining issues in Plaintiff's Response that Plaintiff has either abandoned the disparate treatment claims

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Thomas met their Suprane sales goals at 103% and 107% respectively (see Table One above) and (c.) Morris and Thomas were therefore, not similarly situated to Plaintiff, who did not meet this goal, achieving Suprane sales of 92.8% at mid-year and 92% at year's end in 2004. Likewise, Plaintiff provides data for numerous persons not supervised by Phillips who, for this reason, are also not similarly situated to Plaintiff.

See Mitchell v. Toledo Hosp. 964 F.2d 577, 583 (6th Cir. 1992)("It is fundamental that to make a comparison of a discrimination plaintiff's treatment to that of non-minority employees, the plaintiff must show that the 'comparables' are similarly-situated *in all respects. Stotts v. Memphis Fire Department,* 858 F.2d 289 (6th Cir.1988). Thus, to be deemed 'similarly-situated', the individuals with whom the plaintiff seeks to compare his/her treatment must have dealt with the same supervisor, have been subject to the same standards and have engaged in the same conduct without such differentiating or mitigating circumstances that would distinguish their conduct or the employer's treatment of them for it. *Mazzella v. RCA Global Communications, Inc.*, 642 F.Supp. 1531 (S.D.N.Y.1986), *aff'd*, 814 F.2d 653 (2d Cir.1987); *Lanear v. Safeway Grocery,* 843 F.2d 298 (8th Cir.1988) (plaintiff must prove that he and the white employee were similarly situated in all respects and that the other employee's acts were of comparable seriousness to his own); *Cox v. Electronic Data Systems Corp.*, 751 F.Supp. 680 (E.D.Mich.1990).").

regarding the award of stock options in 2002 and the Trade Relations Manager position or perhaps never intended the facts surrounding these incidents to serve as separate disparate treatment counts.

At any rate, they are briefly addressed in case the undersigned has misinterpreted Plaintiff's silence on these issues.

1. 2002 Stock Options

Defendant apparently concedes that Plaintiff has established a *prima facie* case of disparate treatment regarding the award of stock options in 2002 to several white sales representatives. Under the *McDonald Douglas* framework the burden shifts to Defendant to show a legitimate nondiscriminatory reason for this decision. Defendant argues that the 12 of 170 employees that were provided stock had "high potential", as does Plaintiff, but were seen as a "retention risk", which Plaintiff was not (Exhibit H, Taylor Dep., p. 6, 8). Given the availability of a legitimate nondiscriminatory reason, the burden then shifts to Plaintiff to show that this reason is merely pretextual. The record before the Court does not contain any evidence to support an argument against Defendant's proffer, which is fatal to a claim for disparate treatment based on the 2002 stock options award.

2. Trade Relations Manager

Defendant argues that Plaintiff has failed to state a prima facie claim for disparate treatment with regard to the Trade Relations Manager and Sales Trainer positions because Plaintiff failed to apply for

the positions. Defendant alleges that the Trade Relations position was posted on the company's intranet, that other employees applied and three were interviewed (Exhibit E, Martin Dep., pp. 85-98). The Sales Trainer Position was brought to his attention through an email from Scott Vickers (Dkt. #10, Exhibit 28). Plaintiff testified that he did not apply for either position (Exhibit A, White Dep., pp 224-26, 251-57, 281).

Because one of the *prima facie* elements of a claim for disparate treatment based a failure to promote is that the plaintiff applied for and was denied the position in question, Plaintiff's claim for disparate treatment based on the Trade Relations Manager and Sales Trainer positions should be dismissed.

IV. RECOMMENDATION

For the reasons stated above, it is Recommended that Defendant's Motion for Summary Judgment be GRANTED. The parties to this action may object to and seek review of this Report and Recommendation, but are required to file any objections within 10 days of sevice, as provided for in 28 U.S.C. § 636(b)(1) and E.D. Mich. LR 72.1(d)(2). Failure to file specific objections constitutes a waiver of any further right of appeal. *Thomas v. Arn*, 474 U.S. 140 (1985); *Howard v. Sec'y of Health and Human Servs.*, 932 F.2d 505 (6th Cir. 1991); *United States v. Walters*, 638 F.2d 947 (6th Cir. 1981).

Filing of objections, which raise some issues but fail to raise others with specificity, will not preserve all the objections a party might have to this Report and Recommendation. *Willis v. Sec'y of Health and Human*

Servs., 931 F.2d 390, 401 (6th Cir. 1991); *Smith v. Detroit Fed'n of Teachers Local*, 231, 829 F.2d 1370,1373 (6th Cir. 1987). Pursuant to E.D. Mich. LR 72.1(d)(2), a copy of any objections is to be served upon this Magistrate Judge.

Within ten (10) days of service of any objecting party's timely filed objections, the opposing party may file a response. The response shall be not more than twenty (20) pages in length unless by motion and order such page limit is extended by the Court. The response shall address specifically, and in the same order raised, each issue contained within the objections.

Dated: February 8, 2007
Ann Arbor, Michigan

s/Steven D. Pepe
United States Magistrate Judge

APPENDIX D

UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

No. 07-1626

[Filed October 29, 2008]

TODD A. WHITE,	)
	)
Plaintiff-Appellant,	)
	)
v.	)
	)
BAXTER HEALTHCARE CORPORATION,	)
	)
Defendant-Appellee.	)
	)

ORDER

BEFORE: KEITH, CLAY, and GILMAN, Circuit Judges.

The court having received a petition for rehearing en banc, and the petition having been circulated not only to the original panel members but also to all other active judges of this court, and no judge of this court having requested a vote on the suggestion for rehearing en banc, the petition for rehearing has been referred to the original panel.

The panel has further reviewed the petition for rehearing and concludes that the issues raised in the petition were fully considered upon the original submission and decision of the case. Accordingly, the petition is denied.

ENTERED BY ORDER OF THE COURT

/s/ Leonard Green

Leonard Green
Clerk

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No. 08-960

In The Supreme Court of the United States

BAXTER HEALTHCARE CORPORATION,

Petitioner,

v.

TODD A. WHITE,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Sixth Circuit

BRIEF IN OPPOSITION

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STATEMENT

At the time of the events giving rise to this action, respondent White was an employee of petitioner Baxter Healthcare Corporation, working in a division that produces and sells medical technologies. White worked as a Teaching Center Specialist, which is a specialized sales representative, selling pharmaceutical products to hospitals that run teaching programs, a position in which he was "held to a higher standard of product knowledge and teaching skills." (Pet. App. 3a).

In the fall of 2004, White applied for promotion to the position of Midwest Regional Manager within his sales division. After interviews were held, Baxter did not choose White for the position. Instead, Baxter awarded the position to a white applicant, Maggie Freed.

In early 2005, White received an adverse performance evaluation for his performance in 2004. As a result of that evaluation, White received a smaller raise in 2005. White also argued that as a result, he was no longer on track for further advancement within the company.

White brought this action under Title VII of the 1964 Civil Rights Act, alleging that both the denial of the promotion and the low performance evaluation were the result of racial discrimination. (Pet. App. 5a-13a).

White offered two types of evidence in support of his promotion discrimination claim. First, he sought to show that he was clearly better qualified than the white applicant who received the promotion. The white worker who was promoted had no experience selling the Baxter proprietary pharmaceutical products involved; whereas, White's experience and knowledge were indisputably extensive. White had an MBA; the white worker who received the promotion had no advanced degree. White had significant prior managerial experience from a job at Johnson & Johnson, Inc. Also, White's success in the field was strongly supported by the testimony of his prior manager, Richard Clark, and evidence of his several awards and accolades included in the record. (Pet. App. 23a).

Second, Baxter officials justified their decision in large measure by asserting that during the interviews for the position, the white applicant performed better than Mr. White. They complained in particular that White was "confrontational" in the interview, citing the fact that White had asked one of the interviewers what had been "done to promote cultural diversity within the company." White argued that a jury could reasonably conclude that this objection reflected racial prejudice or stereotyping. (Pet. App. 7a-8a, 25a; see *Price Waterhouse v. Hopkins*, 490 U.S. 228, 256 (1989) (plurality opinion) (criticism of female employee as "aggressive" may be evidence of gender based stereotyping)). *Widoe v. Dist. # 111 Otoe County Sch.*, 147 F.3d 726, 730 (8th Cir. 1998).

In support of the downgraded performance review claim that the adverse rating was the result of racial discrimination, White offered evidence that the supervisor who gave him that rating had made a series of biased remarks. The supervisor told White that "nobody wants to be around a black man." That supervisor made a similar comment to another Baxter employee, remarking that "no one wants to work with a black man." In one conversation, the supervisor referred to a female African-American sales representative as "that Black girl." Although the supervisor always called white workers by their first names, he repeatedly addressed respondent as "White, Todd." Finally, the supervisor circulated an e-mail to Baxter workers which showed an image of Osama bin Laden morphing into O.J. Simpson, and which contained the subject line "I KNEW IT!!! I KNEW IT!!! I KNEW IT!!!" (Pet. App. 4a) (emphasis in original e-mail).

White also contended that his adverse rating was the result of an improper failure to use the proper evaluation standard. White asserted that the evaluation should have been based on a standard known as the "2004 PMO Grid." Under the standard specified in the 2004 PMO Grid, White would have been entitled to a rating of "Meets," apparently short for "meets expectations." In response, Baxter argued that White's supervisor used a different standard referred to as the "Gold e-mail" and that as a result of the use of the Gold e-mail formula, White was instead rated as "Meets minus." The "Meets minus" rating resulted

in a lower raise. White also argued that the rating effectively blocked further advancement within the company. (Pet. App. 8a-11a).

Baxter moved for summary judgment arguing the evidence relied on by White was insufficient to support his discrimination claims. The district court held that the evidence offered to support White's promotion claim was too weak to "allow a reasonable jury to opine that the reasons [offered by the employer] were pretextual." (Pet. App. 105a). With regard to White's performance evaluation claim, the district court held that the evidence adduced by White was insufficient even to establish a prima facie case of discrimination. (Pet. App. 112a).

The court of appeals overturned the district court's decision as to both discrimination claims, and remanded the case for trial. (Pet. App. 2a-50a).

REASONS FOR DENYING THE WRIT

I. THE SIXTH CIRCUIT DECISION DID NOT ESTABLISH AN "ARGUABLY SUPERIOR QUALIFICATIONS" STANDARD

In an employment discrimination case in which the plaintiff alleges that he or she was unlawfully denied a promotion, a plaintiff may support that claim of discrimination "by showing that she was in fact better qualified than the person chosen for the position." *Patterson v. McLean Credit Union*, 491 U.S. 164, 187-88 (1989); see *Ash v. Tyson Foods, Inc.*, 546

U.S. 454, 456 (2006) ("qualifications evidence may suffice, at least in some circumstances, to show pretext"); *Texas Dept. of Community Affairs v. Burdine*, 450 U.S. 248, 259 (1981) ("[t]he fact that a court may think that the employer misjudged the qualifications of the applicants ... may be probative of whether the employer's reasons are pretexts for discrimination"). This case presents an unremarkable application of that rule.

The petition misstates the holding of the court of appeals. Petitioner repeatedly describes the Sixth Circuit as having adopted an "arguably superior qualifications" standard for determining when evidence of comparative qualifications would support a claim of discrimination.[1] Petitioner suggests that under the decision below, any difference in qualifications, no matter how trivial, would suffice, and that the trier of fact could infer discrimination from the mere fact that there was an "arguabl[e]" trivial difference, without ever deciding whether any difference in qualifications actually existed. That asserted Sixth Circuit standard, petitioner contends, differs from the standard in several circuits, the most stringent of which require that the difference in qualifications be so great that the rejection of the plaintiff was unreasonable. (Pet. 14-15).

Under the decision below, however, unreasonableness is indeed the touchstone in evaluating the

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[1] Pet. 9, 11, 12, 17, 19, 20.

probative value of evidence of comparative qualifications.

> One way in which the plaintiff may raise doubts about the lawfulness of the employer's business decision is by suggesting that the decision itself was *unreasonable*.

(Pet. App. 21a n.6) (emphasis added).

> [T]he plaintiff may ... demonstrate pretext by offering evidence which challenges the *reasonableness* of the employer's decision....

(Pet. App. 20a) (emphasis added).

> If a factfinder can conclude that a *reasonable* employer would have found the plaintiff to be significantly better qualified for the job, but this employer did not, the factfinder can legitimately infer that the employer consciously selected a less-qualified candidate – something employers do not usually do, unless some other strong consideration, such as discrimination enters into the picture.

(Pet. App. 22a) (emphasis added) (quoting *Aka v. Washington Hosp. Ctr.*, 156 F.3d 1284, 1294 (D.C.Cir. 1998).[2]

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[2] See Pet. App. 22a ("The reasonableness of the employer's reasons may of course be probative") (quoting *Loeb v. Textron, Inc.*, 600 F.2d 1003, 1012 n.6 (1st Cir. 1979)); 21a-22a n.6 ("the reasonableness of an employer's decision may be considered") (quoting *Wexler v. White's Fine Furniture, Inc.*, 317 F.3d 564, 578 (6th Cir. 2003) (en banc)).

That was the standard actually applied by the court of appeals in upholding the sufficiency of the evidence in this case.

> [W]e find that the evidence presented could lead a jury to doubt the reasonableness of Baxter's decision to hire Freed instead of White, and thereby to infer that some other impermissible motivation – such as White's race – guided the employment decision.

(Pet. App. 22a-23a).

Systematically ignoring these repeated articulations of the standard actually utilized by the Sixth Circuit, petitioner insists that the court of appeals required no more than a showing of "arguably superior qualifications," relying exclusively on the following sentence:

> We find that this evidence of White's arguably superior qualifications ... could lead a jury to doubt the justification given for [the] hiring decision.

(Pet. App. 23a). However, it is quite clear that the court below used the adjective "arguably" to avoid seeming to hold that White's qualifications *were* in fact superior. Without that adjective, this sentence (i.e., the phrase "White's superior qualifications") would have a completely different meaning, and would have constituted a finding of fact by the court of appeals that White was the more qualified applicant. The panel properly insisted to the contrary that

> [t]he question of whether the employer's judgment was reasonable or was instead motivated by improper considerations is for the *jury* to consider.

(Pet. App. 21a n.6) (emphasis in original). Clearly, that is why the opinion recites, not that the court of appeals itself found that the selection of Freed was unreasonable, but only that the jury could have done so. (Pet. App. 23a).

The district courts in the Sixth Circuit have not accepted petitioner's strained interpretation of the decision below. In *Berkeley v. Steelcase, Inc.*, 2009 WL 722601 (W.D.Mich. 2009), the district judge rejected such an

> expansive reading of *White*. Contrary to [the plaintiff's] suggestion, *White* does not call for a jury trial simply because the plaintiff has presented evidence that a reasonable employer **could have found** that the plaintiff was more qualified. As evidenced by the following quotation from *White*, a jury trial is called for when there is evidence that a reasonable employer **would have found** that the plaintiff was more qualified:
>
> > If a factfinder can conclude that a reasonable employer **would have found** the plaintiff to be significantly better qualified ... , the factfinder can legitimately infer ... discrimination.

> [*White v. Baxter Healthcare Corp.*, 533 F.3d 381,] 393-94 [(6th Cir. 2008)] (emphasis added) (quoting *Aka v. Washington Hosp. Ctr.* ....)

2009 WL 722601 at *9-*10 (emphasis in original). The decision below has not guaranteed that a plaintiff will always be able to defeat summary judgment with evidence of differences in qualifications, no matter how minor. To the contrary, since the decision in the instant case, summary judgment has repeatedly been granted to the defendants in district court cases in the Sixth Circuit in which the plaintiff relied on such evidence.[3] Moreover, in every district court decision in the Sixth Circuit in which the court cited the decision in the instant case, the court granted summary judgment.[4]

Petitioner notes that the most stringent standard governing use of evidence of comparative qualifications is in several circuits, including the Seventh Circuit, which require that the differences in qualifications "are so favorable to the plaintiff that there

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[3] *Berkeley*, 2009 WL 722601 at *9-*10 (summary judgment granted); *Physher v. Ohio Dept. of Jobs and Family Services*, 2008 WL 4693734 at *6 (S.D.Ohio 2008) (summary judgment granted); *Wright v. Upper Cumberland Electric Membership Corp.*, 2008 WL 2783519 at *8 (M.D.Tenn. 2008) (summary judgment denied); *Vanallman v. Potter*, 2008 WL 2686629 at *14 (E.D.Tenn. 2008) (summary judgment granted).

[4] *Berkeley*, 2009 WL 722601 at *9; *Corell v. CSX Transp., Inc.*, 2008 WL 4683439 at *12 (E.D.Mich. 2008); *Ahmad v. Kmart*, 2008 WL 4683440 at *7 (E.D.Mich. 2008).

can be no dispute among reasonable persons of impartial judgment that the plaintiff was clearly better qualified for the position at issue." (Pet. 14-15, quoting *Mlynczak v. Bodman*, 442 F.3d 1050, 1059-60 (7th Cir. 2006) (quoting *Millbrook v. IBP, Inc.*, 280 F.3d 1169, 1180 (7th Cir. 2002))). However, less than two years before the decision below, the Sixth Circuit itself expressly endorsed that very Seventh Circuit standard, also citing the Seventh Circuit's decision in *Millbrook*.

> [T]he rejected applicant's qualifications must be so significantly better than the successful applicant's qualifications that no reasonable employer would have chosen the latter applicant over the former. In negative terms, evidence that a rejected applicant was as qualified or marginally more qualified than the successful candidate is insufficient, in and of itself.... This standard accords with several of our sister courts' standards, *see e.g., Jordan v. City of Gary Ind.*, 396 F.3d 825, 834 (7th Cir. 2005) ("What's more, in order to establish pretext, [the plaintiff] must establish that her credentials were 'so superior to the credentials of the person selected for the job that no reasonable person, in the exercise of impartial judgment, could have chosen the candidate selected over the job in question.' ... " (quoting *Millbrook* ...))

Bender v. Hecht's Dept. Stores, 455 F.3d 612, 627 (6th Cir. 2006). The Sixth Circuit standard in *Bender* is virtually identical to the standards in the Second,

Fifth and Eleventh Circuit decisions relied on by petitioner. (Pet. 14-15). The Sixth Circuit applied the *Bender* standard in *Burke-Johnson v. Dept. of Veterans Affairs*, 211 Fed.Appx. 442, 450 (6th Cir. 2006), and again quoted the Seventh Circuit *Millbrook* standard in *Plumb v. Potter*, 212 Fed.Appx. 472, 480 (6th Cir. 2007).

The Sixth Circuit decision in the instant case, although repeatedly referring to whether the difference in qualifications rendered the employer's decision unreasonable, did not itself quote *Bender* or *Millbrook*; neither did the dissenting opinion. But the decision below cannot plausibly be read as repudiating the *Bender* standard, which was binding on the panel below as the law of the circuit. Subsequent to the panel decision in the instant case, district judges in the Sixth Circuit have continued to cite and apply *Bender*. *Wright v. Upper Cumberland Electric Membership Corp.*, 2008 WL 2783519 at *8 (M.D.Tenn. 2008); *Vanallman v. Potter*, 2008 WL 2686629 at *12 (E.D.Tenn. 2008).

The Sixth Circuit standard has over the years proven to be quite stringent. In the vast majority of cases in which this type of evidence has been offered, the Sixth Circuit has held that any differences between the qualifications of a plaintiff and a successful applicant were not great enough to support an inference of discrimination. Indeed, the decision in the instant case is the only occasion since 2004 when any

panel of that circuit has held that comparative qualifications evidence was probative.[5] It may be that the standard in the Sixth Circuit is more demanding than the standard in some other circuits. However, the

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[5] We have been able to identify seventeen cases, including the instant case, in which the Sixth Circuit considered a claim by a discrimination plaintiff that he or she was better qualified than the successful applicant. In thirteen of these seventeen cases, the Sixth Circuit held the comparative qualifications evidence was insufficient to support a finding of discrimination.

Skelton v. Sara Lee Corp., 249 Fed.Appx. 450, 460-61 (6th Cir. 2007) (evidence insufficient); *Brennan v. Tractor Supply Co.*, 237 Fed.Appx. 9, 21-22 (6th Cir. 2007) (evidence insufficient); *Plumb v. Potter*, 212 Fed.Appx. 472, 480 (6th Cir. 2007) (evidence insufficient); *Burke-Johnson v. Dept. of Veterans Affairs*, 211 Fed.Appx. 442, 450 (6th Cir. 2006) (evidence insufficient); *Bender v. Hecht's Dept. Stores*, 455 F.3d 612, 627 (6th Cir. 2006) (evidence insufficient); *Amini v. Oberlin College*, 440 F.3d 350, 360 (6th Cir. 2006) (evidence insufficient); *Hill v. Forum Health*, 167 F.3d 448, 455 (6th Cir. 2006) (evidence insufficient); *Campbell v. International Paper Co.*, 138 Fed.Appx. 794, 797-98 (6th Cir. 2005) (evidence insufficient); *Jenkins v. Nashville Public Radio*, 106 Fed.Appx. 991, 994 (6th Cir. 2004) (evidence sufficient); *Zambetti v. Cuyahoga Community College*, 314 F.3d 249, 253 (6th Cir. 2002) (evidence sufficient); *Tichenor v. Secretary of the Army*, 1999 WL 35813 at *3 (6th Cir. 1999) (evidence insufficient); *Chandler v. Case Western Reserve University*, 1999 WL 196530 at *3 (6th Cir. 1999) (evidence insufficient); *Anderson v. Premier Industrial Corp.*, 1995 WL 469429 at *5 (6th Cir. 1995) (evidence insufficient); *Kline v. Tennessee Valley Authority*, 1993 WL 288280 at *4-*5 (6th Cir. 1993) (evidence sufficient); *Reeher v. Baker Material Handling Corp.*, 1993 WL 220559 at *9 (6th Cir. 1993) (evidence insufficient); *Townsend v. Federal Aviation Administration*, 1988 WL 23726 at *2-*3 (6th Cir. 1988) (evidence insufficient); *Wrenn v. Wernert*, 1985 WL 13320 at *3 (6th Cir. 1985) (evidence insufficient); *EEOC v. Detroit Edison*, 515 F.3d 301, 313 (6th Cir. 1975) (evidence sufficient).

respondent having prevailed even under the Sixth Circuit standard, a decision by this Court adopting a less stringent standard would not alter the outcome of this case.

II. THE SIXTH CIRCUIT DECISION DID NOT ESTABLISH A "SOME EVIDENCE" STANDARD

Petitioner asserts that the Sixth Circuit has adopted a rule that summary judgment may be defeated whenever there is "some evidence" of discrimination, departing from the proper standard which requires proof of evidence "sufficient" to support an inference of discrimination.

> The Sixth Circuit's requirement that a plaintiff need only produce "some" evidence to overcome summary judgment ... conflicts with a long line of Supreme Court precedent that requires a plaintiff to produce "sufficient" evidence to overcome summary judgment.

(Pet. 29).

The actual opinion of the court of appeals cannot fairly be read to authorize such a departure from the established standard for resolving a summary judgment motion. The standard that the court below actually applied was the traditional test for evaluating summary judgment. Summary judgment, the Sixth Circuit correctly observed, is appropriate "[w]here the record taken as a whole could not lead a rational trier of fact to find for the non-moving party."

(Pet. App. 13a-14a) (quoting *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986)).

> The ... issue we must consider with regard to Baxter's summary judgment motion is whether White has presented evidence from which a jury could reasonably infer that White's race was a motivating factor in the issuance of his downgraded 2004 performance evaluation.

(Pet. App. 44a).[6] The court of appeals held that summary judgment was unwarranted because White had met that standard. "We agree with White that a jury could draw such an inference from the evidence presented." (Pet. App. 45a).

> If the jury were to conclude, as it reasonably could based on the evidence presented, that [the responsible supervisor failed to apply] the appropriate standard [in issuing the adverse evaluation], then it could legitimately infer from [the supervisor's] failure to apply this correct standard that an impermissible factor – namely White's race – served as at least a partial motivation.

(Pet. App. 49a).

Petitioner's assertion that the Sixth Circuit failed to inquire whether the evidence was "sufficient" to

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[6] Pet. App. 38a ("plaintiff can prevail ... by *showing* that the defendant's consideration of a protected characteristic 'was a motivating factor'") (emphasis added).

support a finding of discrimination is belied by the opinion as the Sixth Circuit repeatedly used that very standard.

> The ... question that a court need ask in determining whether the plaintiff is entitled to submit his claim to a jury ... is whether the plaintiff has presented "*sufficient* evidence for a reasonable jury to conclude, by a preponderance of the evidence, that 'race, color, religion, sex or national origin was a motivating factor for'" the defendant's adverse action. *Desert Palace* [*v. Costa*], [539 U.S. 90,] 101 [(2003)].

(Pet. App. 38a-39a) (quoting 42 U.S.C. § 2000e-2(m)) (emphasis added). This is the very passage in *Desert Palace* which petitioner suggests the Sixth Circuit ignored. (Pet. 29).

> As Phillips was the Baxter supervisor responsible for evaluating White's 2004 performance, the question becomes whether there is *sufficient* evidence for a jury to conclude that Phillips' decision ... was motivated by the fact that White is an African-American.

(Pet. App. 44a) (emphasis added).

> White has produced *sufficient* evidence to suggest that Phillips harbors a discriminatory animus towards African-Americans.

(Pet. App. 44a) (emphasis added).

> White has produced *sufficient* evidence for a reasonable jury to conclude in his favor on both his single-motive and mixed-motive race discrimination claims.

(Pet. App. 49a) (emphasis added).

Petitioner relies exclusively on a single passage in which the court below stated that "th[e] burden of producing some evidence in support of a mixed-motive claim is not onerous." (Pet. 29; see Pet. App. 36a). The evident purpose of this sentence was not simply by using the adjective "some" to announce the standard as to how much evidence was required, or to disavow the repeated more specific articulations of the applicable legal standard set out elsewhere in the opinion, but only to reject a construction of that standard that would be "onerous." The sentence would have had the same meaning – with none of the implications suggested by petitioner – if the opinion had simply omitted the word "some."

The instant case emphatically is not one in which there was only a mere scintilla of evidence. Petitioner strenuously argues that "a single alleged discriminatory comment" cannot be sufficient to prove that the speaker was biased. (Pet. 31). Certainly, whether an "alleged" biased remark actually occurred would normally be a matter for resolution by the trier of fact. In this case there were several repeated remarks in question, and petitioner does not suggest that a reasonable jury could not have credited the testimony in support thereof. Even if there had been only one

such remark, a reasonable jury could assuredly infer that a supervisor who told a black worker to his face that "nobody wants to be around a black man" harbored the sort of racial animus that might well lead to discriminatory acts. Nothing in the Federal Rules of Evidence, or the decisions of this Court, requires a trier of fact to exonerate a company official because he had made only "a single" bigoted statement to a black worker.

III. THIS CASE DOES NOT PRESENT AN APPROPRIATE VEHICLE FOR RESOLVING ANY ISSUE REGARDING THE USE OF *McDONNELL DOUGLAS V. GREEN* IN MIXED-MOTIVE CASES

The court below noted that, at least at a theoretical level, there is some uncertainty among the lower courts about how to utilize in mixed-motive cases the burden shifting framework in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973), and *Texas Dept. of Community Affairs v. Burdine*, 450 U.S. 248 (1981). While there may be contexts in which those differences are outcome determinative, this is not such a case.

The Sixth Circuit held that there is sufficient evidence in the instant case to support a jury verdict that race was a motivating factor in White's adverse evaluation. Petitioner does not suggest that that fact-bound determination warrants review by this Court. Petitioner does not appear to contend that, in a case

in which a jury had reasonably inferred the existence of an unlawful motivation, *McDonnell Douglas* would nonetheless require that the jury verdict be set aside, and does not claim that any court of appeals has ever construed *McDonnell Douglas* in that paradoxical manner. *McDonnell Douglas* is only "a sensible, orderly way to evaluate the evidence," *Furnco Constr. Corp. v. Waters*, 438 U.S. 567, 577 (1978), and does not require that a plaintiff adduce any particular type of evidence. See *id.* ("the method suggested in *McDonnell Douglas* ... was never intended to be rigid, mechanized, or ritualistic"). As respondent itself expressly notes, this Court in *Desert Palace* held that at trial in a mixed-motive case, the plaintiff "need only present sufficient evidence ... that race ... was a motivating factor for an[ ] employment practice." (Pet. 22) (quoting *Desert Palace*, 539 U.S. at 101).

Petitioner's position appears to be that, even if there is sufficient evidence for a reasonable jury to find the existence of discrimination, *McDonnell Douglas* may nonetheless require an award of summary judgment in favor of the defendant. On petitioner's view, there is a category of cases in which the evidence would be sufficient to support a jury verdict, but which *McDonnell Douglas* nonetheless requires be dismissed prior to trial. Petitioner does not, however, assert that any circuit has held that *McDonnell Douglas* somehow mandates summary judgment in a case in which – were the case to proceed to trial – the evidence would be sufficient to support a verdict for the non-moving party.

Petitioner claims that the Fifth, Eighth and Eleventh Circuits would require an award of summary judgment in the circumstances of this case. (Pet. 24-25). The authorities cited by respondent do not support this contention. Petitioner acknowledges that the Fifth Circuit applies a "modified" *McDonnell Douglas* framework in mixed-motive cases, but asserts that "[s]pecifically, the Fifth Circuit requires a plaintiff to establish that ... others outside the protected class who were similarly situated were treated more favorably." (Pet. 24, citing *Keelan v. Majesco Software, Inc.*, 407 F.3d 332, 339 (5th Cir. 2005)). However, the Fifth Circuit in *Keelan* does not hold that a plaintiff who can establish by a preponderance of the evidence the existence of an unlawful motive must *also* show that there happened to be a "similarly situated" comparator who was treated differently. To the contrary, the court in *Keelan* noted that the Fifth Circuit had no well established rule requiring proof of such a similarly situated comparator.[7]

The prima facie case rule proposed by petitioner would bar claims by – and thus legalize intentional discrimination against – any employees whose circumstances were unique, even where (as here) there

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[7] 407 F.3d at 340 ("[p]rior case law has not consistently applied Title VII's burden-shifting framework to the question of whether a similarly-situated employee outside the plaintiff's protected class was treated more favorably.") (quoting *Nieto v. L & H Packing Co.*, 108 F.3d 621, 623 n.5 (5th Cir. 1997)).

was sufficient evidence for a reasonable jury to infer the existence of unlawful discrimination.

Petitioner asserts that White's claim "would certainly fail" in the Eighth and Eleventh Circuits "because he lacks 'direct evidence' of discrimination and cannot establish a *prima facie* case." (Pet. 25) (citing *Griffith v. City of Des Moines*, 387 F.3d 733 (8th Cir. 2004) and *Burstein v. Emtel, Inc.*, 137 Fed.Appx. 205, 209 n.8 (11th Cir. 2005). However, nothing in these cases indicates that either the Eighth or Eleventh Circuits defines "direct evidence" or "prima facie case" in a manner that would exclude White's claim. *Burstein* says nothing at all about the standard that a plaintiff would have to meet in the Eleventh Circuit to establish a prima facie case. To the contrary, *Burstein* notes that in that case "[n]o one seriously disputes that Burstein presented a *prima facie* case." 137 Fed.Appx. at 209.

Griffith is similarly silent on the type of evidence needed to establish a prima facie case or to prove intentional discrimination, and the Eighth Circuit in that case adopted a definition of "direct evidence" that is clearly inconsistent with the Sixth Circuit's definition of that phrase. *Compare* Pet. App. 16a n.5 (distinguishing between "direct evidence" and circumstantial evidence) *with* 387 F.3d at 736 ("[d]irect evidence ... is not the converse of circumstantial evidence, as many seem to assume.")

Neither Fifth, Eighth or Eleventh Circuit cases cited by petitioner would require summary judgment

in the instant case. Although there are some semantic differences among the other circuits, even petitioner does not claim that those differences would be outcome determinative in the instant case.

CONCLUSION

For the above reasons, certiorari should be denied.

Respectfully submitted,

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